

89-727 (1)

No. _____

Supreme Court, U.S.
FILED
NOV 4 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE PORTMAN,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL UNION OF OPERATING
ENGINEERS, STATIONARY ENGINEERS,
LOCAL 39, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

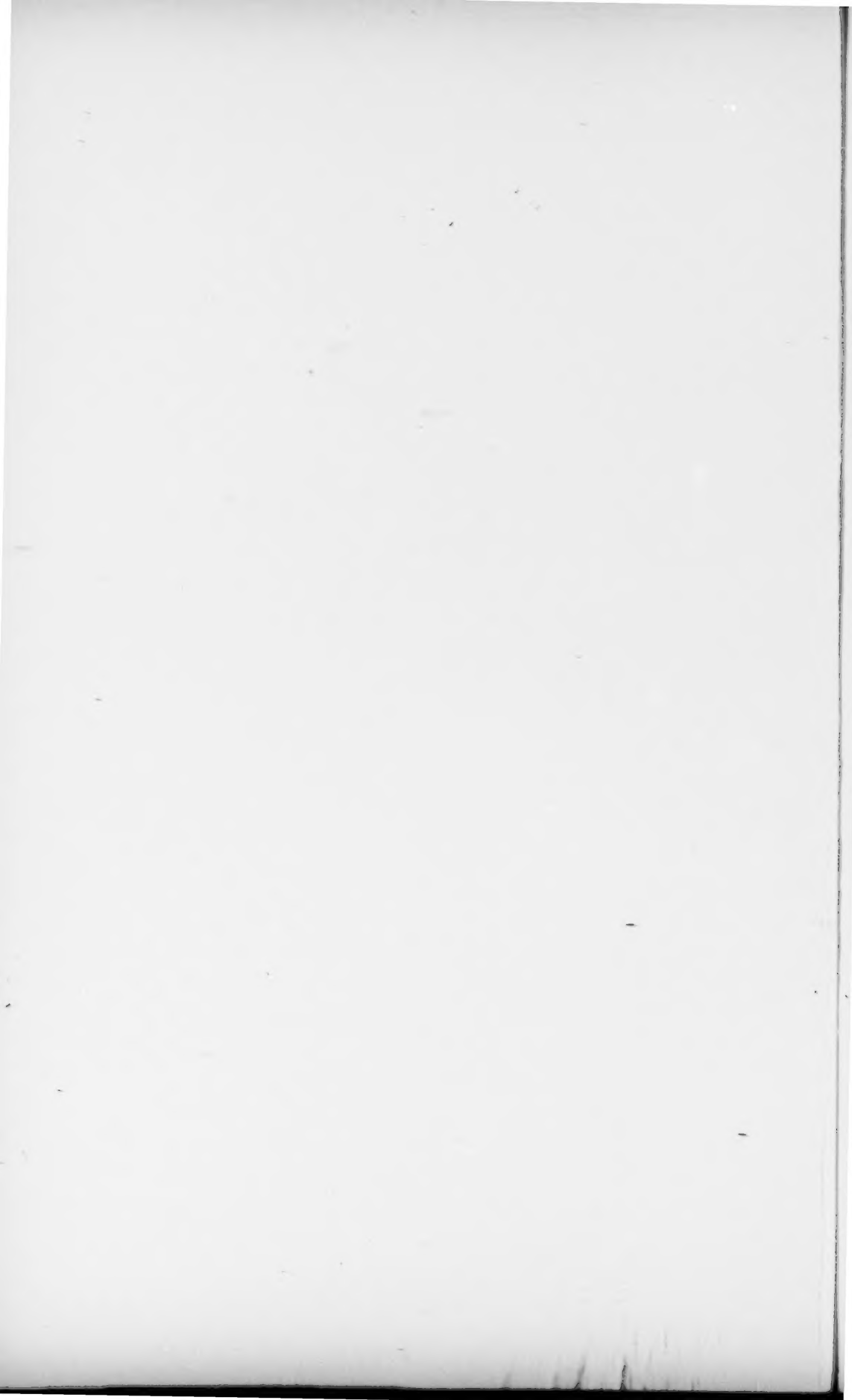
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QUESTION PRESENTED FOR REVIEW

Important Question of Federal Law Addressed to the Supervisory Power of the Court

Whether the NLRB may make a unit determination in an arbitrary and capricious manner that is not supported by substantial evidence and based on the extent of a union's organizational success thereby violating the due process rights of the employer, to wit:

- A. The unit determination is not supported by substantial evidence in the record as a whole.

- B. The NLRB arbitrarily and capriciously excluded relevant evidence that could have materially affected the determination of an appropriate unit.
- C. The NLRB disregarded established policy by ignoring The Portman's organizational structure and business purpose.
- D. The extent of the union's organizational success was the controlling factor in the determination of an appropriate unit.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following is a complete list of all parties to the proceedings in this case.

- (1) Portman Hotel Management Company
- (2) Portman Hotel Company
- (3) International Union of Operating Engineers,
Stationary Engineers, Local 39
- (4) National Labor Relations Board

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REFERENCES TO OPINIONS AND ORDERS IN COURTS AND ADMINISTRATIVE AGENCIES BELOW

On October 5, 1987, a petition was filed with Region 20 of the National Labor Relations Board [hereinafter referred to as the Board or NLRB] by the International Union of Operating Engineers, Stationary Engineers, Local 39 [hereinafter referred to as the Union]¹ seeking to represent nine employees from two different divisions of The Portman Hotel [hereinafter referred to as THE PORTMAN] which employs approximately three hundred and fifty employees. Hearings on that petition, NLRB Case No. 20-RC-16191, were held during which THE PORTMAN introduced documentary and testimonial evidence regarding the functional integration and community of interest of all employees at THE PORTMAN. Some relevant evidence offered by THE PORTMAN was arbitrarily and capriciously excluded by the NLRB.

On March 30, 1988, Regional Director Robert H. Miller issued his Decision and Direction of Election finding that the appropriate unit at THE PORTMAN for collective bargaining purposes included:

All engineering subdivision employees and maintenance attendant employed by the Employer at its San Francisco, California facility; excluding all other employees, guards and supervisors as defined in the Act.

¹ The Union was permitted to intervene in the case before the United States Court of Appeals for the Eleventh Circuit and was a party to the decision.

The unit was comprised of eight out of thirty employees from THE PORTMAN's Property Management Division and one of ninety employees from the Guest Room Services Division.

On April 11, 1988, THE PORTMAN petitioned the NLRB for review of the appropriateness of this unit. THE PORTMAN's request was denied without explanation by mailgram on April 27, 1988.

An election was held on April 27, 1988. On May 10, 1988, the Union was certified as the exclusive collective bargaining representative of said unit of employees.

Subsequently, the Union demanded that THE PORTMAN engage in collective bargaining with the Union over the unit. THE PORTMAN refused, as refusal was the only means to contest the Board's decision. The Board then issued an unfair labor practice complaint in NLRB Case No. 20-CA-21996 on June 21, 1988. On September 30, 1988, the NLRB granted the summary judgment motion of its General Counsel and issued its Order, requiring THE PORTMAN to bargain collectively with the Union over the unit.²

THE PORTMAN petitioned the United States Court of Appeals for the Eleventh Circuit in the most expeditious manner provided by law to seek review of the arbitrary and factually unsupported Order of the NLRB, pursuant to 29 U.S.C. § 160(f). Oral argument was held on August 8, 1989. On August 25, 1989, the panel hearing the case issued its decision granting enforcement of the NLRB's Order.

² *The Portman*, 291 NLRB No. 45 (September 30, 1988).

GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Order granting enforcement of the Order of the NLRB was issued by the United States Court of Appeals for the Eleventh Circuit on August 25, 1989. (App. at A-1.)

The statutory provisions believed to confer upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari are as follows: 28 U.S.C. § 1254 (1); 28 U.S.C. § 1651; 28 U.S.C. § 2101; 28 U.S.C. § 2106.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The constitutional provision involved in this case is the Fifth Amendment to the United States Constitution. The statutes involved in this case are the National Labor Relations Act, as amended, Sections 9(b) and 9(c)(5), 29 U.S.C. §§ 159(b) and 159(c)(5); and the Administrative Procedure Act, as amended, 5 U.S.C. § 706(2). The regulations involved are National Labor Relations Board, Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.64(a) and National Labor Relations Board, Statements of Procedure, Series 8, as amended, 29 C.F.R. § 101.20(c). These authorities are set out at Appendix A-2.

STATEMENT OF THE CASE

This is a case involving the determination of an appropriate collective bargaining unit for THE PORTMAN, a unique luxury hotel in San Francisco, California.

The Union filed a representation certification petition seeking to represent nine out of approximately three hundred and fifty employees at THE PORTMAN.

THE PORTMAN's position is that only an "all-employee" unit is appropriate because of its unique people product design and the functional integration and community of interest of all employees. A splintered unit undermines the unique product and THE PORTMAN's ability to compete in the marketplace.

The Regional Director issued a Decision and Direction of Election finding appropriate a unit of nine employees from two different divisions of THE PORTMAN which coincide with the petitioned-for unit. The Board then conducted an election in that unit.

After enforcement of the NLRB's subsequent bargaining order by the United States Court of Appeals for the Eleventh Circuit, THE PORTMAN has petitioned this Court seeking issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review and set aside the NLRB's Order.

Basis For Federal Jurisdiction

The United States Court of Appeals for the Eleventh Circuit had jurisdiction to review and set aside the Order of the NLRB pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f).

STATEMENT OF THE FACTS

1. THE PORTMAN, The Product — The Difference

THE PORTMAN is a unique luxury hotel which opened on September 2, 1987. THE PORTMAN employs approximately three hundred and fifty employees called associates who service approximately three hundred and forty guest rooms, one fine dining facility, a top floor club lounge and several thousand square feet of banquet and meeting space. THE PORTMAN is located in San Francisco, California, one of the most competitive luxury hotel cities in the world. R. 1331, 1524.³

This hotel was designed, financed, developed and managed by one man—John Portman. The world famous hotel architect and developer testified that he has attempted through THE PORTMAN to emulate the outstanding service experienced at three of the finest hotels in the world, The Mandarin and The Peninsula Hotel in Hong Kong and the Oriental Hotel in Bangkok, Thailand. R. 1521. Mr. Portman realized to bring an oriental product into an occidental culture would generate excessive labor costs because of the high employee per room ratio in the Orient versus the low employee per room ratio in America. R. 1521-25; 1334.

Mr. Portman recognized the need to produce a product different from the other luxury hotels in San Francisco in

³ "R." references are to the paginated transcripts of testimony, R. 1-1760, as well as to the paginated volume of record excerpts entitled "Volume IV Pleadings," R. 1761-2143. "PX." refers to THE PORTMAN's exhibits.

order to survive the intense, established, world-class competition. R. 1524.

Every employee at THE PORTMAN was selected based upon his or her intrinsic motivation to be friendly and to serve guests. The mission of Dr. Donald Clifton and his company, Selection Research, Incorporated [hereinafter referred to as SRI], was to select people who possessed affirmatively friendly attitudes to win guests over and get them to come back. R. 1668. SRI helps define what talents should be for a particular product or company, and then gleans those talents from a pool of applicants. R. 1681-82. Dr. Clifton and his staff reviewed and screened approximately nine thousand applicants to select over three hundred employees. R. 1672. SRI helped create the product at THE PORTMAN which is different from any luxury hotel. R. 1672-73.

John Portman explained the uniqueness of THE PORTMAN as follows:

Out of our experience, and we've designed projects for Carda Lumpur (ph), Jakarta (ph), Bangkok, Manila, Hong Kong and in China Hang Chow (ph) as well as Behjing (ph). But in our experience in Southeast Asia we did smaller hotels. In the United States, we've been primarily major convention hotels, Hyatt, Westin, Marriott. We saw what a small luxury type hotel could be from our experience in Southeast Asia and every year they have, through the ABA, the selection of three best hotels in the United States and all three of them are Asian hotels. They are the Peninsula, the Mandarin and the Oriental in Bangkok.

We were trying to understand why the American Bar Association responds this way year in and year out. What it really is is a combination of two things. A combination of not only the physical facility but it's a combination of the operation. They are much more guest oriented than we here in this country have been. So when we had the opportunity to develop this hotel here in San Francisco, I have always thought that creating a, if you create a great violin but no one knows how to play it or it's a poor player, bad music comes out and unless somehow you can pull those things together you couldn't begin to reach what the full potential was. So the exciting thing of what we've tried to do is as revolutionary as maybe the Atrium Hotel was in 1967 when it opened in Atlanta. But this goes far beyond that in that it not only involves where in the past everything has been separated into little slots, the design is one thing, the operation is another thing and this, we had an opportunity here to really instead of thinking in terms of segregation, think in terms of integration. Not only from the design of the physical facility but thinking in terms of how I would like to be treated as a guest and to move away from the commercial and institutional type facilities that most of our American hotels have developed into, very impersonal. Our service industries are suffering from a lack of concern for the consumer and it's not only in the hotel business, it's in everything. I could go on into what's happening in various industries which have similar kinds of problems, but what it really boils down to is that there's only one way to the future, to be competitive in the world that's evolving and that is to be interested and

concerned with quality and excellence and be interested in serving and interested in giving rather than receiving and not being cynical, believing in people and trying to make people's lives more beneficial.

It's really a people oriented kind of thing. So when it came to designing this hotel and creating the kind of operation and everything that we wanted to come together there, I wanted to think of it more as a home away from home, more residential, more friendly and that when the guest comes that the guest is treated as if a guest came into your home, into your own living room and how would you treat that person. Everything is driven from the human level, from the people level. It's not driven from any abstract level. It's not driven from any object oriented level. It's driven from the human level and what can we do in creating a new kind of concern, a new kind of interest and this kind of hotel that we have developed here would be very very hard to duplicate. There are probably very few cities in the world that could have a hotel like this because it is so unique. Maybe as time goes on that morays change and attitudes change, maybe the future might hold more of this but our whole approach was creating a team, creating a management team which really was a family. It's the hotel's family. And that each part of the family is respected as much as the next part. And that there is no we or they, there is nothing that anybody in the hotel can't do or won't do in a response to a problem from a guest point of view. So this whole philosophical approach which has a human base and we felt that to come into San Francisco at a time when everyone says that San Francisco is

over-built and doesn't need anymore hotel rooms, the last thing that would make any sense was to come in and put up another set of bedrooms and have another hotel just like any other hotel. So we saw this as a great opportunity for the first time in my career to be able to bring together and to mold not only the physical with operational and the whole ambiance, not only the physical ambiance but the human ambiance that would occur. That's the whole story behind the hotel.

R. 1521-24.

Q. BY MR. STOKES: Mr. Portman if you would please explain how the Property Management Division at the Portman Hotel operates?

A. We don't isolate. As a matter of fact we don't isolate anything from anything. This goes back to my statement about the difference between segregation versus integration. But we have for instance the hall porters, the stewards, the operating engineers, maintenance, in other words everything that really relates to the maintenance of the facility becomes a combined effort by all that participate in that activity. That is a unified activity and that activity overlaps. Consequently we felt that in order to carry out this particular operation in the way that we have seen from the standpoint of guest response, and it starts all the way from the driver at the airport to the doorman through everyone throughout the entire staff, it is that no one is isolated into any one specific thing. Everyone is there to serve. They may be asked to do something that might not fit a job description but they respond. They respond in a positive way and it's all oriented to guest satisfaction.

R. 1526.

2. THE PORTMAN's Organization

All PORTMAN employees work under the same Vice President and Managing Director and Executive Operating Committee. There are ten divisions including numerous job classifications at THE PORTMAN. The Property Management Division has approximately thirty employees which includes engineers, lobby porters and stewards. The Guest Room Services Division has approximately ninety employees.

3. Community of Interest

All employees of THE PORTMAN possess virtually the same interests and job characteristics throughout. All employees have individual contracts of employment with THE PORTMAN. The contracts of employment contain an employee bill of rights. PX 5. These unique employment documents also provide for a grievance procedure with binding arbitration. Every employee has his or her own business card.

All employees go through the same orientation program. All employees receive the same benefits. THE PORTMAN has an open-door policy that applies to all employees. Other benefits applying to all employees include: flex time, personal days, insurance, free meals in the employee cafeteria, family rates for using hotel facilities, free employee uniforms that are cleaned and maintained in the same manner, payday every Friday, quarterly employee evaluations, yearly employee evaluations, merit pay raise reviews and a \$500.00 per year educational reimbursement.

All employees complete the same paperwork in the hiring process. The same personnel manual applies to all employees. All employees have the same discount parking benefit. All are issued similar name tags. Insurance benefit packages are the same for all employees. All the rules and regulations in the personnel manual and associate's handbook apply to all employees. The same vacation rules apply to everyone. Holiday pay and leave of absence procedures are the same. Progressive disciplinary procedures apply to all employees. All employees use the associate entrance. THE PORTMAN pledge and mission statement apply to all employees. Only Pat Mene, THE PORTMAN's Vice President and Managing Director, has the authority to terminate an employee. *See generally* testimony of Joe Villa. R. 574-85, 612.

4. Functional Integration

The substantial weight of the evidence confirms the functional integration of the Property Management engineering employees with other employees throughout THE PORTMAN.

Comptroller Mark Everton testified extensively regarding the functional integration and cross-utilization of employees throughout THE PORTMAN. He testified in part as follows concerning the difference between the Mobile five-star, Triple A five-diamond Four Seasons Clift Hotel and THE PORTMAN:

- Q. BY MR. STOKES: Did you come, did you become familiar with the so-called engineering employees at the Four Seasons Clift Hotel Mr. Everton?

- A. I was very familiar with them. While I was employed as the Assistant Comptroller I was responsible for overseeing all of the renovation work that had occurred at the Clift during my two years there. The two years that I was there we had renovated about two-thirds of the guest rooms in the building including the Redwood room which is the lounge there which hadn't been renovated for twenty-five years, also extensive renovation of the lobby and of the French Room which is the dining room and all of the meeting rooms. As part of my responsibilities I was in charge of placing out and receiving bids for all of the work that was consulted with the Engineering Department at the Clift, preparing all the purchase orders, which again was in conjunction with the Engineering Department. The Engineering Department, specifically the Chief Engineer was responsible for all of the actual supervision of the trades and outside contractors that were brought in. I was very closely involved with them in reviewing the financial aspects of the work that was done upon completion of the work.
- Q. How, if in anyway, would you compare the performance of the job duties of Engineering employees in the Property Management Division at the Portman?
- A. From what I've seen of the interaction I've had with the employees at both the Clift during the two years I was there and the Portman during the ten months I've been at the Portman, I see a few similarities but an overwhelming amount of dissimilarities in the way they go about doing their job.
- Q. Would you please elaborate on that sir?

- A. The Engineering Department at the Clift is a very isolated department. Their offices are down in the basement. They have their own separate locker room. They pick up their food from the cafeteria and take it into their own separate dining room and they have their own separate office, their own system of inter-office mail being delivered and picked up from their area. Work orders are put in a lock box that's attached to the outside of a gate that's locked, which is actually the access to the engineering area. They have their own showers and locker rooms. While at the Portman I frequently find myself in the men's room with Property Management employees, people performing engineering tasks. I find myself daily eating meals with them, either breakfast, lunch or dinner. I find myself spending a lot of time in hallways, in public areas, in elevators with Property Management people conducting engineering work.
- Q. Give us some specific examples of what you've observed at the Portman concerning the Engineering or Property Management Division associates performing their duties, vis-a-vis the performance of engineering employees duties at the Clift.
- A. The attitude or the focus of the staff at the Clift was one to maintain the plant. Unfortunately or fortunately the Clift itself is 70 years old and their primary focus was to keep the plant operating. Their job was to, I would guess, you could say their job was to fix the building. While at the Portman the concern is not the plant. The concern is for the satisfaction of the guests, for the safety and satisfaction of the associates. I would say that

their orientation at the Portman is more in line with fixing the guest and fixing the employees' workplace, the associates' workplace than it is fixing the plant.

Q. And give us an example of that sir?

A. I find that I am in the office quite late at night. I find that there is a Property Management engineer who visits the accounting office on rounds to walk through the office, to walk back into the computer room that's in the back of the accounting office and to inspect the computer equipment and the electrical back there, which I look at as primarily for the safety of myself and my staff. There's an extremely high voltage transformer back there and it's very important that someone is keeping an eye on that to maintain our safety.

I also have witnessed the Property Management engineers performing their duties as a part of the Life Safety Program at The Portman. Which again is in keeping with the safety of the guests and the safety of the associates. The Clift, the Life Safety Program is administered by the Manager on duty. Not due to the technical nature of the equipment, but due to the fact they feel that at the Clift the Assistant Manager, whose job is daily interaction with the guests, is more in tune with maintaining guest safety than it is to have one of the engineers looking out for guest safety. At the Portman we feel that guest safety can best be overseen by someone that's most familiar with the building and with where the guests are located. That would be one of the Property Management people.

I've also seen a lot of engineers or the Property Management engineers asking associates if ev-

everything is okay, if there is anything they can do for them. One of the policies at the Portman is that if you have a problem you may ask an engineer or a Property Management maintenance person if they can correct it for you at that point. If they are unable to do so then they'll ask you to fill out a work request that will then be routed through the office for scheduling. That would have been an impossibility at the Clift. You didn't talk to the engineers to ask them to hang a bulletin board or to try to unstick a lock or to try to fix a toilet. You went down to the basement and submitted a work order into the locked box on the outside of the locked cage to get them to do the job. Those are the major differences I see.

- Q. Have you come to observe, in the ten months that you've been at the Portman Hotel, employees or associates that are not in the Property Management Division doing work that at the Clift would be considered Engineering Department work?
- A. Most definitely. . . .
- Q. Have you ever seen anything like that at the Clift?
- A. On the contrary. What I found myself facing several times was initiating work I felt needed to be done and finding that I was in jeopardy of a grievance procedure. In my office at the Clift I was in need of some shelves. One Saturday I brought a drill and some molly bolts and some wall brackets and hung some shelving and was very proud of the job I had done hanging shelving. Unfortunately due to the threat of grievance I spent the next Sunday taking my shelving down because it had not been assembled by Property

Management or by Engineering personnel which is part of their contract and agreement.

R. 778-783, 785.

It is un rebutted that Property Management engineering employees regularly interact with, cross-utilize with, and are functionally integrated with all other employees of THE PORTMAN.

ARGUMENT AND CITATION OF AUTHORITY

Introduction

A court reviewing a unit determination decision determines whether the decision is arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support. Reviewing courts also decide questions of law. 5 U.S.C. § 706(2).

Where findings in support of a Board order are not supported by substantial evidence in the record considered as a whole, the Board order cannot be enforced. *See NLRB v. The Westin Hotel*, 738 F.2d 765 (6th Cir. 1984). Even where an administrative agency's decision is supported by substantial evidence, the decision cannot be arbitrary and capricious. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1983).

In *NLRB v. The Westin Hotel*, *supra*, the Sixth Circuit reviewed a bargaining unit determination of maintenance department employees. The regional director had based his decision on:

the weight of the record evidence, particularly the unique skills possessed by the maintenance employees, their separate supervision, and the

paucity of a current area-wide pattern of bargaining or a broader unit basis.

Id. at 767.

Although the court acknowledged that the Board had considerable discretion in choosing from among a range of appropriate bargaining units, the court refused to enforce the Board's bargaining order because one factor, the Board's finding of a lack of a consistent area-wide pattern of bargaining in units larger than the maintenance department, was not supported by substantial evidence in the record considered as a whole. Rather, the prevailing pattern favored overall hotelwide units. *Id.* at 769.

The case before this Court represents two fundamentally competing considerations. One is the right of an American in a capitalistic society to create a unique people product specially designed to compete in a particular marketplace.

Another is the responsibility of a federal agency to make certain labor relations decisions in a wholly neutral manner based on its expertise and the facts before it that may affect that people product.⁴

John Portman is the American. He is a renowned architect, entrepreneur, and rebuilder of inner cities. THE PORTMAN is his product. In 1967, John Portman designed

⁴ In an exchange during oral argument Judge Fay asked the NLRB attorney, Mr. Hitterman, whether there was any set of facts which would justify an all-employee unit if not in this case. Mr. Hitterman's response for the Board was that an all-employee unit may never be appropriate. Such a rigid position is contrary to the Board's duty to make unit determinations on a case-by-case basis.

the Hyatt Regency in Atlanta and substantially altered the design of hotels throughout this country.

In 1987, John Portman created THE PORTMAN in San Francisco. This unique people product was based on the idea of bringing oriental service to a luxury hotel in the United States. In order to compete THE PORTMAN must provide oriental service with a much lower employee per room ratio than similar service in the Orient. This requires great flexibility with complete cross-utilization and function integration of all employees. The success of this endeavor depends on a cohesive interchangeable work force subject to the same personnel policies, practices and procedures.

The NLRB's decision must be based on substantial evidence in the record as a whole. In making unit determination cases in the hotel industry, the Board is to apply on a case-by-case basis the same general community of interest criteria used in other industries, including distinctions in skills and functions of particular employee groups, their separate supervision, *the employer's organizational structure* and differences in wages and hours, as well as *integration of operations*, and employee transfer, interchange, and contacts (emphasis supplied). All relevant criteria must be considered. See generally *ACL Corporation, d/b/a Atlanta Hilton and Towers*, 273 NLRB 87 (1984).

Are administrative agencies right when they are wrong? They are not. The NLRB must use its expertise to base unit determination decisions on the facts of each case. The NLRB may not abandon its neutrality and ignore the evidence in making unit determinations. A reviewing court has the duty to scrutinize each case closely and not defer

blindly to administrative agency decisions. It is not the role of courts to rubber stamp administrative proceedings that are erroneous. Unfortunately, the Eleventh Circuit abdicated its responsibility as a reviewing court in this matter by summarily affirming the NLRB's unit determination without addressing the important legal issues involved.

A. The Unit Determination is not Supported by Substantial Evidence in the Record as a Whole.

The Regional Director in the case at bar found an appropriate unit consisting of only: eight engineering employees within the Property Management Division (approximately thirty employees) and one maintenance attendant within the Guest Room Services Division (approximately ninety employees) of the hotel (the unit sought by the Union). R. 728, 1215.

The Regional Director disregarded the weight of the evidence and applicable law in concluding that this gerrymandered unit possessed a distinct community of interest.

The Regional Director's conclusion that THE PORTMAN's employees' assistance with each other's tasks is "incidental" and "reflects a spirit of cooperation or civility rather than an overlap of job functions" is not supported by the record evidence as a whole. A review of the record shows that the substantial evidence requires just the opposite conclusion. Nothing is "incidental" about it.

Cross-utilization and functional integration of employees are planned and required at THE PORTMAN. THE

PORTMAN's success depends upon providing qualitatively different service to guests. The guest comes first, and the task comes second. Employees do whatever task is at hand to service the guests. R. 304-06. The emphasis is on teamwork to get the job done. R. 433-34.

THE PORTMAN prohibits employees from using phrases such as "this is not my job." R. 446. Employees are required to do whatever is necessary to service the guests irrespective of job position. R. 473. Employees go beyond their traditional job classifications to get the job done. R. 767-68. Employees are willing and do perform a variety of tasks outside their traditional job classifications. R. 1030. This work ethic applies to engineering employees as well as others. R. 1154-55. Over a year was spent developing the organizational structure of the hotel that would permit it to compete successfully. R. 1339-40. Tasks get done to serve the guests, not waiting for the job to be performed by someone in the job classification who is assigned to do the particular tasks. R. 1433.

The record is replete with examples of all employees performing whatever tasks are at hand notwithstanding their job classification. Witnesses gave dozens of examples of engineering employees performing non-traditional engineering tasks and non-engineering employees performing traditional engineering tasks.

B. The NLRB Arbitrarily and Capriciously Excluded Relevant Evidence That Could Have Materially Affected the Determination of an Appropriate Unit.

The Board arbitrarily and capriciously refused to consider testimony from Professor Paul Gaurnier proffered by THE PORTMAN.⁵R. 1319-21. Professor Gaurnier is a former dean of the Graduate School of Hotel Administration at Cornell University and is a renowned expert concerning hotel operations and organization. He has taken tours with hotel executives who showed him operations data concerning the following hotels in San Francisco: The Fairmont, The Stanford Court, The Hilton, The Four Seasons Clift Hotel, The Donatello, The St. Francis, The Hyatt Regency, The Holiday Inn, the Handerly Motor Inn and THE PORTMAN. In particular, in preparation for his testimony, Professor Gaurnier toured THE PORTMAN, The Four Seasons Clift Hotel and The Stanford Court.

He was prepared to discuss the organizational structure of THE PORTMAN, how it relates to service, a comparison of THE PORTMAN's organizational structure with the Four Seasons Clift Hotel and The Stanford Court, and the effect the petitioned-for unit would have on THE

⁵ The Board's actions and decisions throughout the unit determination hearing were arbitrary and reflected that the Board abandoned its neutrality in this matter. One example is that counsel for THE PORTMAN discovered counsel for the Union and the hearing officer behind closed doors immediately after the close of evidence one day in an area where Board personnel had advised counsel for the PORTMAN not to go. Counsel for THE PORTMAN made a motion for the hearing officer to be recused because of the appearance of impropriety which was denied. R. 843-875.

PORTMAN's organizational structure and service (See generally THE PORTMAN's Appeal to Regional Director from Hearing Officer's Refusal to Admit Expert Testimony of Evidence of Professor Paul Gaurnier and Professor Gaurnier's 27-page affidavit as an offer of proof.)⁶

The Board clearly did not believe employment at THE PORTMAN was a prerequisite for admission of relevant testimony: Wilt Linier is Vice President of Engineering for Marriott Corporation. R. 1608. Dr. Donald Clifton is chairman and CEO of SRI. R. 1654.

Professor Gaurnier's testimony would not have been cumulative. He was not an employee of a hotel company. He was the only academic called to testify during the hearing. He is one of the foremost experts on hotel operations and organization in the United States. Professor Gaurnier is personally familiar with the organizational structure of several luxury hotels in San Francisco. The Board's action in excluding Professor Gaurnier's testimony is arbitrary and capricious in light of comparative evidence of other hotels received from: Robert Hydorn, Ralph Mork, Mark Everton, Spencer Scott, Larry Ott, Larry Sternberg, Michael Jump, Ben Balansag, Patrick Mene, Charles Lo, Scott McKibben and Wilt Linier.

The Board's action in excluding Professor Gaurnier's testimony was arbitrary, violative of its policies, and denied THE PORTMAN administrative due process. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 176-77 (1941); *Atlas Copco, Inc. v. Environmental Protection Agency*, 642 F.2d 458,

⁶ This pleading is part of THE PORTMAN's SUPPLEMENTAL APPENDIX at A-5.

467 (D.C. Cir. 1979); National Labor Relations Board, Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.64(a); National Labor Relations Board, Statements of Procedure, Series 8, as amended, 29 C.F.R. § 101.20(c). "The Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 fn.4 (1974).

The exclusion of Professor Gaurnier's testimony could have materially affected the outcome of the appropriate unit decision because there would have been undisputed expert testimony in the record that THE PORTMAN's organizational structure and flexibility are critical to the business purpose of the hotel and its ability to compete successfully in the San Francisco luxury hotel market.

C. The NLRB Disregarded Established Policy by Ignoring THE PORTMAN's Organizational Structure and Business Purpose.

The Regional Director approved the petitioned-for unit which took employees out of two separate hotel divisions thereby ignoring the hotel's organizational structure. The Board is required to consider the employer's organizational structure in making a unit determination. Generally, an employer wants a collective bargaining unit to coincide with the employer's organizational structure.⁷ See *Atlanta Hilton*, *supra*. As Justice Stone noted in *Pittsburgh Plate Glass*, 313 U.S. at 176-77:

⁷ R. Gorman, BASIC TEXT ON LABOR LAW 69 (1976); C. Morris, THE DEVELOPING LABOR LAW 421 (2d ed. 1983).

As we are often reminded, most of the decisions of the Board involve discretion which is to be exercised by it alone and not the courts. For that reason the only substantial right of the litigant before the Board is, in most cases, the right to invoke the exercise of that discretion upon a full and fair consideration of all of the relevant evidence. . . . One of the most important safeguards of the rights of litigants and the minimal constitutional requirement in proceedings before an administrative agency vested with discretion, is that it cannot rightly exclude from consideration facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion.

The Board has long held that "the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Company*, 96 NLRB 295, 298 fn. 7 (1951).

The Board has specifically stated that the employer's business purpose is relevant in determining an appropriate bargaining unit. In *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962), the Board stated in pertinent part as follows:

In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is

basic to and permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

In *Birdsall, Inc.*, 268 NLRB 186, 190 (1983), the Board after citing *Kalamazoo, supra*, with approval stated as follows:

Thus, in determining the unit appropriate for collective bargaining herein, a consideration of the various employee classifications or functions is incomplete without an analysis of how they interact within the Employer's operational scheme so as to carry out its business purpose. . . . Simply put, and as is clear from the above recitation of facts, the Employer's operation is highly integrated and adaptive . . .

Indeed, the factual reality of the Employer's operation compels a determination that a broader unit is appropriate. . . . it operates with a high degree of functional integration, including substantial interchangeability and contact among employees. As described above, the Employer's business purpose and operations require that employees be frequently shifted from one area to another on an ad hoc basis, and the promptness of the response to the Employer's quickly varying requirements is essential . . . it is the "as-needed" flexibility of the work force which is far more

operationally critical, and gives the Employer's business its distinctive character.

The Regional Director in this case ignored THE PORTMAN's organizational structure and the distinctive character of the hotel's operation in carving out an alleged appropriate unit. Pat Mene, THE PORTMAN's Vice President and Managing Director, took more than one year to develop the organizational structure of the hotel. R. 1339-40. The Property Management Division was organized as the group that cleans, repairs and maintains the hotel. R. 558-59. There is no separate engineering department. Included in this Division are engineering employees, stewards and lobby porters. The heads of the hotel's ten different divisions report to Mr. Mene. See PX. 30.

The Regional Director's unsubstantiated assertion that THE PORTMAN failed to show how a unit of only engineering employees will adversely affect the hotel's product and service is not supported by substantial evidence in the record considered as a whole. It ignores the testimonies of numerous witnesses of how separate engineering units in fact operate on a daily basis in luxury hotels in San Francisco.

It is undisputed that San Francisco has one of the most crowded and competitive luxury hotel markets in the world. THE PORTMAN can compete successfully only by offering service that is unique. THE PORTMAN has tried to create a niche by offering oriental service with a limited, affordable number of employees. Unlike oriental hotels that have a ratio of three or four employees per guest room, THE PORTMAN seeks to provide similar service with a work force ratio of roughly one employee per guest room. The

unique service depends upon a unified, completely integrated, team approach to guest service. All aspects of THE PORTMAN's employee relations, including: organizational structure, the recruitment and orientation process, personnel policies, practices and procedures, and functional integration so that all employees do whatever it takes to serve guests immediately, are coordinated to cultivate and nurture teamwork among employees that *does* distinguish THE PORTMAN from its competitors.

Establishing different terms and conditions of employment for certain employees will undermine THE PORTMAN's ability to maintain the level of teamwork essential to its success. *See generally* testimonies of John Portman R. 1521-24, Pat Mene R. 1331-56, Larry Sternberg R. 1099-1117 and Dr. Donald Clifton R. 1685, 1699-1700, 1702-03.

D. The Extent of the Union's Organizational Success was the Controlling Factor in the Determination of An Appropriate Unit.

There is no separate engineering department at THE PORTMAN. Engineering employees are part of the Property Management Division. There is no separate supervision of them by a chief engineer. Ralph Mork, their immediate supervisor, is the House Light and Power Supervisor. Michael Jump, Director of Property Management, has overall responsibility for engineering employees, lobby porters and stewards. There are no reported hotel unit determination cases where the Board has created a unit by taking employees from two different divisions and excluding other employees in those divisions from the unit, thereby ignoring the employer's organizational structure.

The hearing officer refused to allow counsel for THE PORTMAN to ask the Union's assistant business manager, Robert Hydorn, whether the Union petitioned for the unit based on the extent of its organizational success. R. 12-17. Counsel for the Union stated on the record that the Union petitioned for the same unit that it represents in other major hotels in San Francisco. R. 17 and 48. There had been no decision and direction of election regarding a petitioned-for unit of engineering employees in San Francisco prior to this case. R. 127-28.

The Union filed a petition to represent nine engineering employees at THE PORTMAN. The Union declined to commit as to what position it would take if the Regional Director found a different unit to be appropriate. R. 1756-57. In the Union's brief to the Regional Director the Union sought to represent the engineering employees and the Guest Room Services maintenance attendant. R. 1872. The unit designated by the Regional Director consisting of nine employees is the unit sought by the Union.

The conclusion is inescapable that the Regional Director's decision sought to preserve the Union's general bargaining unit in San Francisco, irrespective of the compelling facts in this case, THE PORTMAN's organizational structure and business purpose, and the Board's policy of a case-by-case analysis.

The extent of a union's organizational success shall not be controlling in making a unit determination. *See NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 497 (1985); 29 U.S.C. § 159(c)(5). Where the extent of a union's organizational success is the controlling factor in the determination of an appropriate unit, a bargaining order will not be enforced. *Ramada Inns, Inc. v. NLRB*, 487 F.2d 1334 (9th Cir. 1973); *Westward Ho Hotel Co. v. NLRB*, 437 F.2d 1110 (9th Cir. 1971).

CONCLUSION

This is not a case about management attempting to be non-union. This is a case about the ability and right of an entrepreneur to create and maintain a product. THE PORTMAN must have uniform personnel policies, practices and procedures for all employees, whether union or non-union, to maintain its unique product.

The NLRB is required to be wholly neutral in unit determination cases. The NLRB may not exclude relevant evidence, disregard relevant criteria and act in an arbitrary and capricious manner to satisfy a union's organizational interests. The findings of the Board are not supported by substantial evidence in the record considered as a whole. The NLRB's actions violated the administrative due process rights of THE PORTMAN. The purpose and intent of the National Labor Relations Act are frustrated and damaged by the NLRB's decision in this case.

For all of the foregoing reasons, arguments and authorities, it is respectfully submitted that this Court should grant the Petition of THE PORTMAN and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review and set aside the NLRB's order.

Respectfully submitted,

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NO. 88-8746

NLRB No. 20-16191

THE PORTMAN,

**Petitioner,
Cross-Respondent,**

versus

NATIONAL LABOR RELATIONS BOARD,

**Respondent,
Cross-Petitioner.**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NO. 39,**

Intervenor.

**Petitions for Review of an Order of the National
Labor Relations Board**

(August 25, 1989)

**Before FAY and HATCHETT, Circuit Judges, and
ALLGOOD*, Senior District Judge.**

PER CURIAM: ENFORCED. See 11th Cir. R. 36-1.

* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. CONSTITUTION

Amend V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NATIONAL LABOR RELATIONS ACT

Section 9(b). The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate

representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Section 9(c)(5). In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

ADMINISTRATIVE PROCEDURE ACT

Section 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2). Hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

NLRB RULES AND REGULATIONS

Section 102.64(a). Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the act.

NLRB STATEMENTS OF PROCEDURE

Section 101.20(c). The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which

is non-adversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

89-7 27

No. _____

Supreme Court, U.S.

FILED

NOV 4 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE PORTMAN,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL UNION OF OPERATING
ENGINEERS, STATIONARY ENGINEERS,
LOCAL 39, AFL-CIO,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

SUPPLEMENTAL APPENDIX

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE PORTMAN

and

Case 20—CA-21996

INTERNATIONAL UNION OF OPERATING
ENGINEERS, STATIONARY ENGINEERS,
LOCAL 39

DECISION AND ORDER

On June 21, 1988,¹ the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain following the Union's certification in Case 20—RC—16191. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations of the complaint.

On July 11 the General Counsel filed a Motion for Summary Judgment, with attachments, and a memorandum in support. On July 15 the Board issued an order transferring the proceeding

¹ All dates are in 1988 unless otherwise stated.

to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent and the Union filed responses.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the ground that the unit of engineering subdivision employees and maintenance attendants found appropriate by the Regional Director in the underlying representation proceeding is inappropriate. All issues raised by the Respondent were or could have been litigated in the prior proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding.² See

² In its answer, the Respondent denies that portion of par. 2(a) of the complaint that alleges that it is a California corporation. Contrary to its denial, however, the Respondent stipulated in the underlying representation proceeding that it is a California corporation. The Regional Director so found, and the Respondent did not challenge this finding in its request for review of the Regional Director's Decision and Direction of Election. Further, the Respondent's response to the show cause notice does not address the issue and provides no clue about its state of incorporation if other than California. As the Respondent previously entered a stipulation regarding its state of incorporation and admits the allegations of complaint pars. 2(a), (b), and (c) regarding its operations, dollar volume of business, and involvement in interstate commerce, we find that the denial raises no material issue of fact warranting a hearing.

Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

Respondent is a California corporation with an office and place of business in San Francisco, California, where it is engaged in the operation of a hotel providing food and lodging for guests. Based on a projection of its operation since about September 2, 1987, when it commenced operations, the Respondent will annually derive gross revenues in excess of \$500,000. Since the opening of its San Francisco facility, the Respondent, in the course and conduct of its operations, has purchased and received at the facility products, goods, and materials valued in excess of \$1500 directly from points located outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practice

A. The Certification

Following the election conducted on April 27, the Union was certified on May 10 as the collective-bargaining representative of the employees in the following appropriate unit:

³ Although Member Johansen dissented on the denial of review in the underlying representation case, he considers that to be the law of the case and consequently joins his colleagues in the present decision.

All engineering subdivision employees and maintenance attendants employed by the Respondent at its San Francisco, California, facility; excluding all other employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since May 11 the Union has requested the Respondent to bargain, and since June 2 the Respondent has refused. We find that this refusal constitutes a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after June 2, 1988, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date that the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962);

Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, The Portman, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Operating Engineers, Stationary Engineers, Local 39 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All engineering subdivision employees and maintenance attendants employed by the Employer at its San Francisco, California, facility; excluding all other employees, guards and supervisors as defined in the Act.

(b) Post at its facility in San Francisco, California, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. September 30, 1988

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union of Operating Engineers, Stationary Engineers, Local 39 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All engineering subdivision employees and maintenance attendants employed by the Employer at its San Francisco, California, facility; excluding all other employees, guards and supervisors as defined in the Act.

THE PORTMAN

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 901 Market Street, Room 400, San Francisco, California, 94103-1735, Telephone 415-995-5308.



**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE PORTMAN¹

Employer

and

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, STATIONARY ENGINEERS,
LOCAL 39**

Petitioner

Case 20-RC-16191

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁴

All engineering subdivision employees and maintenance attendant employed by the Employer at its San Francisco, California facility; excluding all other employees, guards and supervisors⁵ as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in

person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by International Union of Operating Engineers, Stationary Engineers, Local 39.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 901 Market Street, Suite 400, San Francisco, California 94103 on or before April 6, 1988. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by April 13, 1988.

Dated March 30, 1988

at San Francisco, California

/s/ Robert H. Miller

Regional Director, Region 20

- ¹ The name of the Employer appears as corrected at the hearing.
- ² The Employer appeals certain rulings by the hearing officers in this case. During the course of the hearing, the Employer sought to challenge certain of these rulings through interim appeals, which were denied by me. In its brief the Employer presents no argument in support of its appeal of any of the hearing officers' rulings in question. Moreover, there is no indication that the rulings of the hearing officers constituted prejudicial error. Accordingly, these appeals are hereby denied.
- ³ The parties stipulated to the following commerce facts: The Employer is a California corporation with a facility in San Francisco, California and has been engaged in the operation of a hotel providing food and lodging services since it opened for business on September 2, 1987. Upon a projection of its business operations from its opening in September 1987 to November 1987, the Employer will derive annually gross revenues in excess of \$500,000.00. Since the opening of its San Francisco facility in September 1987, the Employer has purchased and received at that facility goods valued in excess of \$1,500.00 directly from points located outside the State of California. Based on these facts, I find that the Employer meets the Board's jurisdictional standards under Sections 2(2), (6) and (7) of the Act.
- ⁴ The Petitioner requests a unit of maintenance and engineering department employees, excluding all other employees. The Employer takes the position

that such a unit is inappropriate and that the only appropriate unit is one that includes all hotel employees. For the reasons set forth below, I find that a unit of engineering employees is appropriate.

The record shows that the Employer is large, luxury hotel which opened for business in September 1987. The hotel's facilities include 340 guest rooms; several food and beverage facilities, including a restaurant, lounge, buffet, and employee cafeteria; several conference rooms and a ballroom. Overall responsibility for the hotel is in the hands of the vice president and managing director, Pat Mene. Mene, together with the director of human relations, the director of marketing and the comptroller, comprise the executive operating committee. This committee is charged with overseeing the day-to-day operations of the hotel. Reporting to Mene are the heads of ten different divisions, entitled respectively administration, front office, guest room services, conference and catering, marketing, kitchen, room service, grill, beverage management, and property management. These divisions are further organized into subdivisions headed by individuals denoted by the Employer as either managers or supervisors. Approximately 350 individuals work at the Portman. There is no history of collective bargaining and no other labor organization seeks to represent any of the Employer's employees.

The property management division is headed by Michael Jump. Reporting directly to Jump are the house, light and power supervisor, Ralph Mork, a support services coordinator, Renee Heider, and the acting executive steward, Dennis Rollo. Heider supervises approximately three lobby porters and also orders engineering supplies under Jump's direction. In addition, Heider coordinates the work of outside contractors who handle flowers and greenery for the hotel and other contractors who perform certain cleaning work. When Mork was hired in April, 1987, he was told by Jump that he would be serving in the capacity of assistant chief engineer and that Jump's position was equivalent to that of chief engineer, in addition to other duties. Approximately two weeks prior to the beginning of the hearing in this case, Mork was informed that henceforth, he was going to have full responsibility for overseeing the engineers work, in order that Jump's work load would be lightened. Eight engineers report directly to Mork. Six of these individuals are considered as general maintenance engineers, while one specializes in

painting and another is considered to be the carpentry specialist. The job title of all eight individuals is property management engineer.

The record shows that all eight engineers had substantial experience performing highly skilled engineering work prior to joining the Portman staff. Two of the engineers worked for several years as engineers at other hotels. One of these two was described by Mork as a skilled carpenter, while the other had also worked as a laborer/foreman in the construction of the Portman and was familiar with the hotel's inner workings. Another engineer has a masters degree in environmental engineering with expertise in heating, ventilation and air conditioning and had worked previously as a remodeling general contractor. One of the engineers had worked for approximately six years as an independent contractor performing cabinet making, painting and paperhanging work, while another previously had worked with a general building contractor and had been a laborer on several projects at another hotel. Mork described this individual as having expertise in cement work, ceilings and plumbing. One of the engineers had owned a television and electronics repair shop for twelve years, while another had worked for several years as a building automation computer technician and had been employed for one and one-half years as an engineer at a high-rise office building. Finally, one of the engineers had been employed as an engineer in a large office building for a period of several years.

The engineers are charged with monitoring and performing preventive maintenance and emergency repairs on several mechanical systems essential to the functioning of the hotel. Although these systems, in addition to other equipment, are still covered by warranty, the engineers eventually will be charged with repairing them and all other electrical mechanical devices in the hotel. Exceptions to this are the elevators and the air conditioning systems, which are to be handled by outside contractors. The engineers are responsible for monitoring and maintaining low pressure boilers, cooling towers, an emergency diesel power system, two 350-ton train chillers with pumps, a computerized building automation system and a computerized life safety system, and two air compressor systems. No other employees at the Portman have responsibility for monitoring, maintaining and repairing these systems. The engineers were provided with certain training to aid them in performing these functions, including a two-week course on the two computerized systems and other training sessions focusing on the boilers,

the sprinkler control systems, the chillers and the refrigeration equipment. All of the engineering subdivision employees received this training regardless of their area of specialty within the subdivision. No other employees participated in these training sessions. The engineers, in addition to the kitchen employees, were given training on the kitchen equipment.

Engineers are also charged with effecting repairs on plumbing, hardware, woodwork, machinery and all varieties of electrical and mechanical devices throughout the facility, subject to the warranty restrictions mentioned above. Repair orders reach the engineering staff via written or oral work requests, which come into the engineering office shared by Mork and Heider. There is no evidence that any other employees receive work assignments in like manner, other than the maintenance attendant discussed in detail below. The evidence shows that, in the interests of efficiency, employees in other departments often try to make minor repairs requiring simple hand tools, such as screwdrivers, and may attempt to fix broken machinery prior to contacting the engineers. Some witnesses testified that such repair efforts by employees who are not engineers are more common at the Portman than at other hotels. However, with the exception of the maintenance attendant in the guest room services division, discussed in detail below, only engineers are charged with making repairs as a regular component of their duties. The record also reflects that, once an engineer arrives on the scene to make a repair, an employee in the department in which the repair is needed will often remain with the engineer and provide assistance by handing him or her tools or providing "a second set of hands" in dismantling cumbersome parts. When the engineer has completed the repair, he or she will often remain to assist in cleaning up any disarray or spills caused by the breakdown or the repair.

In addition to these duties, engineers work on various special projects throughout the hotel. For example, engineers remodeled the banquet kitchen, assembled a weigh machine for the purchasing director, set up special electrical wiring for three gala events, and performed various custom carpentry jobs. The record also shows that engineers, and all other hotel employees, are exceptionally helpful to guests and to fellow employees. Thus, when they come across employees or guests needing assistance, engineers will help move furniture, lift luggage, and push heavy carts and boxes.

The evidence reflects some overlapping duties between engineers and other employees. Engineers and personal valets (who clean guest rooms) work jointly in re-keying all of the locks in the hotel approximately every three weeks. Engineers, in addition to employees in some other departments, have assembled prefabricated furniture or installed shelving or bulletin boards. Employees in several departments change light bulbs in their respective work areas, while engineers also perform this function. Employees in several departments, in addition to engineers, perform trouble-shooting and make minor repairs on the hotel's computer systems. In addition, engineers have worked with the assistant controller in setting up and redesigning the hotel's computer hardware and wiring.

The engineers work on three eight-hour shifts. Engineers on all shifts report to the engineering office when they arrive at work in order to sign in on a time sheet. Day shift and swing shift engineers receive work assignments from Mork upon arrival. Graveyard shift engineers meet with Mork before ending their shift. The watch engineer position is rotated among the engineers on a daily basis. The watch engineer spends about an hour making mechanical rounds and spends the remainder of the morning on repair work orders in guest rooms. At mid-shift, a second set of rounds is made and the remainder of the shift is spent again responding to repair requests. Repair work is performed by the engineers throughout the hotel, as well as four engineering shops consisting of a paint shop, a plumbing shop, a machine shop and a carpentry shop. These shops are located next to the engineering office. Also located on this floor on the basement level are Jump's office, the chiller room, the guest room services (commonly known as housekeeping) office and a storage area.

Engineers receive their work assignments from Mork. Mork sets priorities for work and assigns the various repair work and other projects to the engineering staff. Mork checks up on the work performed by the engineers, monitors their work times, and spends the remainder of his time ordering supplies and performing engineering work himself. Mork has full authority to grant overtime, while requests for time off must be approved by Jump. Although Jump gave Mork full authority to handle all disciplinary problems, no discipline other than verbal warnings has been meted out. None of these warnings have been documented in writing. Jump originally sets the wage rates to be paid to the engineers. He has also held monthly meetings with the

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engineers in order to give them an opportunity to air grievances. The evidence does not establish whether Jump will continue to conduct these meetings now that Mork's role in overseeing the engineering subdivision has been expanded. Neither Mork nor Jump has authority to discharge an employee but may only make recommendations to the director of human resources. This individual reviews the matter and refers it to Pat Mene, the vice president and managing director, for a final decision.

Both Mork and Jump have played a role in hiring engineers. The hotel's hiring process begins with a telephone interview conducted by representatives of the human resources department in which candidates are screened for personal qualities, such as helpfulness and desire to please others. Candidates who pass this screening are personally interviewed by the manager interested in hiring them. Managers have full authority to decide whether to hire prospective employees, subject only to a reference check conducted by the human resources division. Jump interviewed all of the engineering subdivision applicants and made the final hiring decisions. Mork participated with Jump in two interviews. In both cases he recommended to Jump that the candidates be hired and, in both cases, the individuals were hired.

As noted above, the property management division includes lobby porters and stewards in addition to the engineering subdivision. Lobby porters are charged with cleaning the lobby, entry court and public rest rooms. Heider, their immediate supervisor, has authority to schedule their work and to handle disciplinary matters. Stewards work in the various kitchens and dining areas, washing dishes, emptying garbage and clearing and stacking plates. They report to work and sign in at the chief steward's office. Two lead stewards oversee the activities of three to four stewards. According to Jump, the acting executive steward has authority effectively to recommend discipline, to schedule employees' work, to grant overtime and to make, or effectively recommend, hiring decisions.

The guests rooms services division employs an individual, Ben Balansag, whose job it is to make repairs in guest rooms and whose title is maintenance attendant. Personal valets, who clean the guest rooms, initially try to make repairs and contact Balansag if they are unsuccessful in doing so. However, if a repair request is such that it will take longer than fifteen minutes to complete, Balansag is required to refer the job to the engineering

subdivision. Balansag reports to work in the guest services division office but receives assignments in the form of written work orders which are kept in a slot marked with his name in the engineering subdivision office. Balansag frequently utilizes the engineering shops, where he obtains tools, parts and supplies and effects repairs. Balansag works together with engineers on a daily basis on repair projects and frequently looks to them for suggestions regarding his work. According to Jump, Balansag also receives work assignments from the engineering department three or four times a week when he is not busy with guest room repairs.

Balansag worked for several years as an engineer at various hotels prior to joining the Portman staff. Jump devised a job description for Balansag's job and also played a role in his hiring. Spencer Scott, the director of guest services, told Jump that he was looking for an individual with strong mechanical and plumbing skills. He asked Jump to interview candidates and to make a hiring recommendation. Jump interviewed five candidates and referred two to Scott, one of whom was Balansag. Balansag testified that he was interviewed by Jump and then referred to Scott, who described the position to him. Balansag initially was paid at the rate of \$10.52 per hour. Later, Jump recommended that Balansag be paid the same rate as the engineers, \$19.93 per hour, as he was performing engineers' work. Balansag was granted this wage increase, effective November 4, 1987. Jump testified that, in his opinion, Balansag was a skilled engineer who was capable of being transferred into the engineering subdivision at any time.

The record shows that the working conditions of the engineers, along with those of Balansag, differ in several respects from the conditions under which other employees work. The engineers and Balansag are the only employees who supply their own tools or who receive assignments in the form of work orders. Only the engineers and Balansag wear gray uniforms; other employees wear white or green uniforms. Engineers receive five uniforms per week, while other employees receive only three. While other employees may borrow hand tools from the engineers from time to time, only the engineers and Balansag utilize tools and work in the four engineering shops on a regular basis. Engineering subdivision employees are the only non-management employees to be issued "grand master" keys giving them access to virtually all doors in the hotel. According to Mork, engineers are the only employees who have been called back during periods they are not

scheduled to be working. This practice has been necessitated by the fact that the engineers possess expertise necessary to effect certain repairs. Finally, engineers and Balansag earn \$19.93 per hour, substantially more than all other rank and file employees at the Portman except for a part-time pianist, who earns \$25.84 per hour, but who works only six hours per week and does not receive fringe benefits. The vast majority of employees earn between \$5.95 and \$10.00 per hour. Certain clerical and accounting staff receive between \$10.34 and \$11.54 per hour, while the line cook earns \$12.50 per hour and the bartender earns \$11.77 per hour. Food service personnel and various service employees receive tips which supplement their wages.

Engineers share certain terms and conditions of employment with other hotel employees. All employees, including engineers, utilize a designated employee entrance, eat meals and take breaks in an employee cafeteria, are subject to the same personnel policies and receive the same fringe benefits. All employees, including engineers, attend the same orientation seminars upon being hired. It is the Employer's policy to attempt to fill job vacancies from within the hotel and several employees have transferred to other positions. However, there have been no transfers into or out of the engineering subdivision.

The evidence reflects that Petitioner is party to collective bargaining agreements covering employees at 25 major San Francisco hotels and 1 major hotel in neighboring San Mateo County. These agreements cover only engineering/maintenance department employees. The Employer introduced evidence showing that, of seventy hotels in San Francisco contacted by the Employer for information, forty-four have collective bargaining agreements with at least one union and twenty-five have agreements with Petitioner. The Employer's survey does not reflect whether any of the forty-four unionized hotels are organized into bargaining units in which engineers are combined with employees in other job classifications. The evidence also shows that the San Jose Hyatt Hotel In Santa Clara County, located south of San Mateo County, is party to a collective bargaining agreement covering all of the hotel's employees in a single "wall-to-wall unit." In *Hotel Sofitel*, 20-RC-16188, it was found, and I hereby take administrative notice that, in San Mateo County, five of the fourteen unionized hotels have contracts in which engineers are represented by Petitioner in a separate bargaining unit, while two hotels are party to union contracts covering all employees in "wall-to-

wall" units. It was further found in that case that engineers at the Fairmont Hotel in Santa Clara County are represented by Petitioner in a separate unit, while at nine other hotels in Santa Clara County, engineers are represented in broader units, in some cases including all other hotel employees. In sum, the bargaining pattern in the three-county area described above appears to be mixed in nature with respect to whether engineers are represented in separate units for purposes of collective bargaining or as part of larger units.

A substantial amount of evidence was adduced as to the exceptionally high quality and degree of service provided to guests of the Portman as compared to other large luxury hotels. In this regard, the evidence shows that employees of the Portman are instructed to give guest service their highest priority and to be courteous and helpful to guests and co-workers even when such helpfulness involves performing tasks that are not a regular component of their job duties. Several witnesses testified that engineers and all other Portman employees are friendlier, more cooperative among themselves, and offer more assistance to guests than employees of other major hotels in San Francisco and elsewhere.

In making unit determinations in the hotel industry, the Board takes into account the same traditional community of interest considerations which it considers to be important in other industries, including distinctions in skills and functions of particular employment groupings, their separate supervision, the employer's organizational structure and differences in wages and hours. *77 Operating Co.*, 160 NLRB 927 (1966), en'f'd. 387 F.2d 646 (4th Cir. 1967); *Omni International Hotel of Detroit*, 283 NLRB No. 73 (Mar. 31, 1987); *Dunfey Family Corporation d/b/a Sheraton Motor Inn*, 210 NLRB 790 (1974). The Board has, in several recent cases, specifically addressed the issue of whether engineering/maintenance department employees in a hotel constitute a separate appropriate unit. *Sheraton-Anaheim Hotel*, 252 NLRB 959 (1980); *The Westin Hotel*, 277 NLRB 1506 (1986); *Omni International Hotel of Detroit*, *supra*; *Maxim's de Paris Suite Hotel*, 285 NLRB No. 61 (August 20, 1987) and *Hilton Hotel Corporation, Sun Cal Investments No. 1, Ltd., d/b/a Los Angeles Airport Hilton and Towers*, 287 NLRB No. 36 (December 16, 1987). See also *Western Lodging Corp., d/b/a Stanford Park Hotel*, 287 NLRB No. 137 (Feb. 29, 1988), in which the Board approved a petitioned-for unit consisting of maintenance and housekeeping employees where such employees shared separate immediate supervision.

In the first of these cases, *Sheraton-Anaheim Hotel, supra*, the Board adopted the Regional Director's findings that the engineering employees' distinct skills and separate supervision by the chief engineer indicated that a separate unit of these employees was appropriate, in spite of the fact that the engineers were not "highly skilled," that there was some, albeit minimal, overlapping of duties between these employees and those in other departments and that there had been two permanent transfers and one temporary transfer into the department during the preceding two years. Engineers, in that case, performed both skilled and unskilled maintenance and repair work, while some of the more complex repair work was contracted out. Engineers in *Sheraton-Anaheim* shared certain working conditions as a group that differentiated them from the other employees: they were required to bring their own tools, they were assigned work pursuant to a unique work order system and they carried a beeper at all times. In finding a separate unit to be appropriate, the Regional Director, in *Sheraton-Anaheim*, noted that there was a mixed pattern of bargaining for engineering/maintenance units in the local area, that there was a lack of any bargaining history at the hotel on a broader basis and that no other labor organization was seeking to represent hotel employees in a broader unit.

Later, in *Westin Hotel, supra*, the Board, upon a remand from the U. S. Court of Appeals for the Seventh Circuit (reported at 738 F.2d 765), rejected a departmental unit of engineering/maintenance employees in favor of an overall unit. In so doing, the Board distinguished *Sheraton-Anaheim, supra*, on the basis that the local area bargaining pattern in *Westin* was that of overall units and that an intervening labor organization desired to represent *Westin* employees in a "wall-to-wall" unit. In determining that a departmental unit was not appropriate, the Board noted that there was not strong evidence that the maintenance and engineering department employees possessed unique skills or that those employees were separately supervised. The Board further noted that maintenance and engineering employees occasionally worked together on projects with employees in other departments, that the duties of those employees and other hotel employees were functionally integrated, and that maintenance and engineering department employees worked under similar terms and conditions as those of other hotel employees. Maintenance employees, in *Westin*, were classified as Maintenance Worker I, II and III, according to their level of experience. The Maintenance Worker III position required only "mechanical aptitude." Only two of the eleven maintenance

employees were Maintenance Worker I employees, who performed the more technical tasks. The average pay for Westin maintenance employees fell within the median level for all hotel service employees.

More recently, in *Omni International Hotel*, *supra*, *Maxim's de Paris Suite Hotel*, *supra*, and *Los Angeles Airport Hilton and Towers*, *supra*, the Board found units consisting exclusively of engineering/maintenance department employees to be appropriate. In all of these cases, the Board relied on the following community-of-interest indicia which are also present in the instant case: distinct job duties and unique skills, separate immediate supervision and higher wage rates paid to engineers than to other hotel employees, and a lack of interdepartmental transfers. In *Maxim's*, the Board relied on certain additional factors, which were present in *Sheraton-Anaheim* and which are also present in the instant case, namely, the fact that engineering department employees worked under a unique work order system and that they supplied their own tools. In both *Omni* and *Maxim's*, as in the instant case, the engineering department head himself made all final hiring decisions, whereas in *Airport Hilton* the personnel department interviewed job candidates and made all final hiring decisions. In these three cases, as in *Sheraton-Anaheim* and the instant case, engineering employees performed a wide range of functions, from changing light bulbs to routine preventive maintenance and making all varieties of repairs. In *Omni* and *Airport Hilton*, as here, the hotel's equipment was still under warranty at the time hearing and, thus, major repairs were being performed by outside repair persons. In *Maxim's*, outside contractors provided repair services for televisions, elevators, fire alarms, fire sprinkler systems, tile, marble and office equipment. Engineering department employees in that case did not perform major structural alterations or major air conditioner repairs.

In all three of the Board's post-*Westin* cases, the Board distinguished *Westin* on the basis that, unlike the circumstances in *Westin*, there was not a prevailing local area pattern favoring overall units and no other labor organization had expressed an interest in representing the employer's employees in a broader unit. In *Omni*, the local area bargaining pattern among hotels was that of engineering department units, whereas in *Maxim's* and *Airport Hilton*, as in the instant case, the local area pattern was a mixed one.

In all of the post-*Westin* cases the Board expressly discounted the significance of certain community-of-interest factors which it previously had found to be important in *Westin*. Thus, in *Maxim's*, the Board quoted its decision in *Omni* in which it had stated that the fact that employees in different departments occasionally assist each other with various projects "reflect[s] a 'spirit of cooperation or civility' rather than an overlap of job functions." 285 NLRB No. 61, slip op. at p. 4, quoting 283 NLRB No. 73, slip op. at p. 3. Furthermore, in *Omni*, the Board noted that, while other employees occasionally performed certain minor maintenance tasks, no other employees *regularly* performed maintenance work. In *Airport Hilton*, the Board acknowledged evidence as to a number of instances in which engineering department employees had worked alongside non-engineering department employees and other evidence disclosing that some nonengineering department employees occasionally had performed maintenance type work. In addressing such evidence the Board stated that: certain common endeavors which occur between engineering department employees and in the kitchen, housekeeping, security, and other departments do not obliterate the clear functional distinction between the essentially maintenance and repair duties of the engineering department and the duties required of, and performed by, nonengineering employees." In a footnote to this sentence the Board further commented:

Thus, for example, the Employer places great emphasis on contacts between engineering department employees and employees in departments such as housekeeping. It details record evidence that employees in these two departments interact in the cleaning of major water leaks and other cleanup and maintenance operations. Although it is clear that such incidents of cooperation occur, we are not persuaded that they establish a blurring of the functional distinction between the duties of engineering and the duties of housekeeping. Indeed, this difference in job duties to a large extent explains why the Employer pays housekeeping employees in the range of \$4.25 to \$4.75 per hour and pays engineering/maintenance employees up to \$15.50 per hour. Apart from other factors, this wage disparity tends to undermine any claim that there is a substantial overlap of job functions.

Airport Hilton, *supra*, 287 NLRB No. 36, slip op. at pp. 5-6.

Finally, in both *Omni* and *Maxim's*, the Board emphasized that the sharing of certain terms and conditions of employment among engineering employees and other hotel employees—such as identical fringe benefits, punching the same time clock, wearing name tags and uniforms, being paid on an hourly basis, and sharing common overall supervision—fails to establish that a separate engineering/maintenance unit is not an appropriate unit, even though such factors would constitute considerations in favor of an overall unit if such a unit had been sought. *Omni, supra*, 283 NLRB No. 73, slip op. at p. 4; *Maxim's, supra*, 285 NLRB No. 61, slip op. at p. 4.

In light of the evidence described above and in accordance with current Board policy, I find that a unit of engineering-subdivision employees is appropriate. As the above discussion illustrates, all of the Board's recent decisions on this issue are directly applicable to the circumstances in this case. The Employer contends that the Portman's "product," which it characterizes as "world-class oriental service," will be "destroyed" if the Region determines that a unit consisting only of engineers is appropriate. The Employer reasons that its "product" requires employees to operate as a team in providing services to guests and that a unit which encompasses only one group of employees will interfere with the Employer's team approach. The Employer does not explain, however, why a unit composed exclusively of engineers will have this undesired effect. As noted above, the Board specifically addressed the issue of overlapping duties and interdepartmental cooperation in all three of its post-*Westin* decisions and, in all three cases, the Board determined that, in spite of such circumstances, the evidence nevertheless reflected clear functional distinctions between engineers and employees in other departments. While the engineers at the Portman may be more helpful to guests and co-workers than engineers at some other hotels, and while employees in other departments at the Portman may attempt simple repairs more frequently than at some other hotels, such overlap is incidental and does not reflect any greater degree of functional integration than was present at the hotels which were the focus of the Board's post-*Westin* decisions.

With respect to the unit placement of maintenance attendant Ben Balansag, the record reflects that Balansag shares an overwhelming community of interest with the engineers. Balansag performs repair duties of the same nature as those handled by the engineers, he is paid the same wage rate as the engineers, he wears the same type of

uniform and receives job assignments in the same manner as the engineers. He utilizes the same tools and work areas as the engineers in performing his work. Petitioner requests that Balansag be included in the engineering subdivision unit, while the Employer has expressed no position on this matter. Under these circumstances, I find that Balansag is included in the unit herein found appropriate.

- ⁵ The Employer has not taken a position as to the supervisory status of Ralph Mork. The Union, while contending that Mork was not a supervisor, conceded that this was a "close question" and acknowledged that "Mork may, in fact, be in the process of becoming a supervisor within the meaning of the Act." The evidence shows that Mork uses independent judgment in assigning work to engineers, inspecting their work and making schedule changes. In addition, the record reflects that he grants overtime and that he has authority to discipline engineers. Based on this evidence, *I find that Mork is a supervisor within the meaning of Section 2(11) of the Act and that he is excluded from the unit.*



November 20, 1987

THE PORTMAN,

Employer

and

Case 20-RC-16191

INTERNATIONAL UNION OF OPERATING
ENGINEERS, STATIONARY ENGINEERS,
LOCAL 39,

Petitioner.

RULING ON APPEAL

After careful consideration, I have denied your appeal of the Hearing Officer's ruling to prohibit the testimony of proffered witness Professor Paul Gaurnier.

Robert H. Miller, Regional Director
Region 20

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 20**

THE PORTMAN,

Employer,

CASE NO. 20-RC-16191

and

**INTERNATIONAL UNION
OF OPERATING
ENGINEERS, STATION-
ARY ENGINEERS,
LOCAL 39,**

Petitioner,

**APPEAL TO REGIONAL
DIRECTOR FROM HEAR-
ING OFFICER'S REFUSAL
TO ADMIT EXPERT TES-
TIMONIAL EVIDENCE OF
PROFESSOR PAUL
GAURNIER**

**TO THE HONORABLE ROBER MILLER
REGIONAL DIRECTOR**

INTRODUCTION

This case involves a unit determination in which the I.U.O.E., Local 39 ("union") petitioned to organize what the union claims is an engineering unit for purposes of collective bargaining at The Portman, a luxury, transient hotel located at Post and Mason Streets, San Francisco California. The Portman maintains there exist sufficient functional integration and community of interest among all nonsupervisory job classifications to justify an all-employee unit.

The Portman has presented over one dozen witnesses and thirty-plus exhibits over eight days of hearings. Evidence, both

testimonial and documentary, has been received comparing engineering job duties, functional integration, and commonality of interests at The Portman with several San Francisco area hotels within what the union contends is the "area pattern of bargaining."

On Tuesday, November 17, 1987, The Portman offered the testimonial expert evidence of Professor Paul Gaurnier, of the School of Hotel Administration, Cornell University, Ithaca, New York. Subsequent to oral argument on the record by Arch Stokes, counsel for The Portman, regarding the admissibility and relevance of Professor Gaurnier's testimony, and pursuant to Section 11226, N.L.R.B. Casehandling Manual, Inter Alia, Mr. Stokes proffered the affidavit of Professor Gaurnier as a partial offer of proof. Additionally, Mr. Stokes requested that the complete offer of proof on the admissibility and relevance of Professor Gaurnier's testimony be an examination of Professor Gaurnier himself, who was present in the hearing room, ready, willing and able to testify. The Hearing Officer reviewed Professor Gaurnier's 25-page affidavit in a few minutes and ruled (1) that the affidavit was the only offer of proof allowed, and (2) that Professor Gaurnier's testimony was inadmissible.

This ruling was in spite of a further offer of proof by Mr. Stokes that Professor Gaurnier had participated in the design of the "Property Management Division" at the St. Francis Hotel in San Francisco, a subject explored on cross-examination by union's counsel of Michael Jump, Director of Property Management Division at The Portman.

The Portman now appeals from the Hearing Officer's ruling and incorporates by reference the previously submitted affidavit of Professor Gaurnier, as well as the oral representations of Professor Gaurnier's testimony by Mr. Stokes as an offer of

proof supporting the admissibility of his expert testimony. The Portman further appeals the Hearing Officer's refusal to take testimony of Professor Gaurnier as an additional offer of proof. The Portman also appeals the Hearing Officer's refusal to receive Professor Gaurnier's testimony in rebuttal of evidence adduced on cross examination of Michael Jump by opposing counsel.

Professor Gaurnier's expert testimony is critical to establishing that the petitioned-for unit is "utterly inappropriate" for this employer and its associates (employees). The Portman's product is unique, professional, luxury hospitality service in the highly competitive hotel industry in the United States and, more particularly, San Francisco and Northern California. This product demands difference. This product demands a synergism between and among all guests and employees in architectural design and people service. The segregated, gerrymandered petitioned-for unit is anathema to this product which is inextricably intertwined with employee relations at The Portman. A proliferation of segregated units would drastically affect, at best, and destroy, at worst, the *raison d'être* of The Portman.

The bases for admission of this expert evidence are as follows:

- (1) While the rules of evidence are not strictly adhered to in N.L.R.B. "RC" unit determination hearings, the established administrative rules and procedures demand liberality and not Draconian restriction on the admissibility of evidence.
- (2) The N.L.R.B.'s own Rules, Regulations, Statements of Procedure, and Casehandling Manual require a full and complete record.

- (3) The Supreme Court of the United States has opined that due process forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.
- (4) The Portman has the burden of convincing the Regional Director that the petitioned-for unit is inappropriate. Accordingly, The Portman should be afforded a full opportunity to present its position and to produce significant facts in support thereof.
- (5) Union Exhibits 1, 2 and 3 were introduced for the purposes of establishing the "area pattern of bargaining." Thus, the union has opened the door for the admission of evidence relating to so-called engineering bargaining units in San Francisco. This necessarily makes relevant evidence of whether the "pattern" is applicable to The Portman.
- (6) Evidence comparing the engineering areas of hotels in what the union contends to be the "area pattern of bargaining" is, by definition, admissible since the N.L.R.B. and Regional Directors have determined applicable "areas" in numerous cases.
- (7) On the first day of the hearing, the Hearing Officer overruled union objections to questions by The Portman's counsel on an analysis and comparison of job duties set forth in union Exhibits 1, 2 and 3. This was during examination of Robert Hydorn, a union representative who has never worked at The Portman and who has no personal knowledge

of the job duties of the engineering associates at The Portman.

- (8) The Regional Director must consider the facts and the result of comparison cases when determining the appropriateness of the proposed bargaining unit. This necessarily includes the "holdings" of relevant board decisions, as well as comparative bargaining units in the area. For example, the Hearing Officer cited the Omni/Detroit "RC" case as "seminal." The Portman would, of course, be allowed to introduce evidence distinguishing its facts from that case, among others. Similarly, it should be allowed to distinguish itself from other hotel bargaining units in what the union claims to be the "area pattern of bargaining." Therefore, to prohibit an expert witness from testifying to factual similarities or distinctions between The Portman and a hotel which the union argues is the "same" for bargaining purposes would be arbitrary, capricious, and a denial of due process.

STATEMENT OF FACTS

The union offered Mr. Robert Hydorn to authenticate union Exhibits 1, 2 and 3, and to establish that the petitioned-for bargaining unit was within the "area pattern of bargaining" among "Class A" luxury hotels in San Francisco. The Hearing Officer received the collective bargaining agreements between this union and approximately 25 hotels in the city and county of San Francisco. Tr. 10-26-87, p. 18, Ln. 9-25. William Sokol, counsel for the union, stated "for the record" that "this union is petitioning for the *same* unit as it represents in every Class A

hotel in the city and county of San Francisco. . . . " Tr. 10-26-87, p. 48, ln. 15-18 (emphasis supplied).

At several other points during Mr. Hydorn's testimony, Mr. Sokol repeated the union's position that the bargaining unit sought at The Portman is "exactly like" or the "same as" those bargaining units covered by union Exhibits 1, 2 and 3. Tr. 10-26-87, p. 77, ln. 6-9; p. 78, ln. 19-20. For the purpose of supporting the union's position, Mr. Sokol questioned Mr. Hydorn concerning the job classifications and duties of the engineers employed at the hotels covered by those Exhibits. See, for example, Tr. 10-26-87, p. 29, ln. 18-25; p. 30, ln. 1-10, p. 33, ln. 22-25.

Upon cross-examination, Arch Stokes further questioned Mr. Hydorn regarding the specific duties of the engineers covered by union Exhibits 1, 2 and 3. Tr. 10-26-87, p. 74, ln. 16-23. Mr. Sokol objected to this line of questioning on the basis that the Exhibits "spoke for themselves." Tr. 10-26-87, p. 75, ln. 1-14. Mr. Stokes responded to the objection by stating that because the union had introduced union Exhibits 1, 2 and 3 for the purpose of establishing the "area pattern of bargaining" standard, The Portman had the right to question this "so-called" expert to compare the duties of engineers in the existing bargaining units with those of the associates at The Portman. Tr. 10-26-87, p. 75, ln. 15-25; p. 76, ln. 1-21. Mr. Sokol's objection was overruled by the Hearing Officer. Tr. 10-26-87, p. 76, ln. 22.

For an additional two and one-half pages of the transcript, Mr. Sokol argued that he "might" object to future comparative evidence and that he did object to the timing of receipt of comparative evidence. Tr. 10-26-87, p. 76-80. He recognized that Mr. Stokes intended "to also introduce evidence concerning job duties and classifications in the hotels in the city and county of

San Francisco . . . for the purposes of comparison." Tr. 10-26-87, p. 77, ln. 9-12. The Hearing Officer again ruled in favor of the receipt of such evidence and the line of questioning to which Mr. Sokol was objecting. Tr. 10-26-87, p. 80, ln. 7-8. Mr. Sokol continued to object and argued, despite the ruling. Tr. 10-26-87, p. 80-84.

After luncheon recess, Mr. Stokes' examination of Mr. Hydorn relating to a comparison of the job duties continued consistent with the Hearing Officer's rulings. Tr. 10-26-87, p. 85-88. Subsequently, further such comparative evidence was elicited and received from each and every witness who had worked at another hotel than The Portman, including Ralph Mork (Sir Francis Drake and The St. Francis), Mark Everton (The Four Seasons Clift), Spencer Scott (Hyatt), Larry Ott (Hyatt), Larry Sternberg (Hyatt, Omni and numerous others), Michael Jump (Meridien and Ramada Renaissance), Ban Balansag (Holiday Inns), Patrick Mene (Hyatt, Omni, Westin, and numerous others), and Charles Lo (Hyatt). Mr. Sokol himself exhaustively elicited comparative evidence of engineering duties at other San Francisco hotels covered by union Exhibits from Mr. Michael Jump, director of the Property Management Division at The Portman.

ARGUMENT

The comparative evidence offered by The Portman should be received into evidence. It will be a denial of administrative due process to admit, receive and consider the evidence thus far reflected in the record without admitting similar comparative evidence. The Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. *Red Ball Motor Freight, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 95 S. Ct. 438, 443, fn. 4 (1974).

It is the duty of an N.L.R.B. Hearing Officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the N.L.R.B. or the Regional Director may discharge their duties under § 9(c) of the Act. N.L.R.B. Rules and Regulations, Section 102.64(a).

The parties are supposed to be afforded a full opportunity to present their respective positions and to produce the significant facts in support of their contentions. N.L.R.B. Statements of Procedure, Section 101.20(c).

These rules and procedures are not for the benefit of labor organizations, employers or administrative agencies. They are for the benefit of *employees*. The N.L.R.B. is responsible for conducting an election that will reflect the free choice of employees in the appropriate unit. N.L.R.B. Statements of Procedure, Section 101.18(a). The determination of the electorate is obviously the most critical decision in furtherance of employees' rights collectively to bargain or to refrain therefrom within the meaning of the Act.

The refusal of an administrative agency to consider evidence introduced at a hearing before it constitutes arbitrary action. *See, e.g., S.D. Warren, Co. v. N.L.R.B.*, 342 F.2d 814 (1st Cir. 1965). Refusal by an administrative body to consider factors properly before it and relevant to the decision at hand is arbitrary and capricious. *See Cousins v. Oliver*, 369 F. Supp. 553 (E.D. Va. 1976).

Administrative agency actions must have a reasonable or rational basis if it is to avoid the stigma of arbitrariness. *See Carlisle Paper Box Co. v. N.L.R.B.*, 398 F.2d 1 (3rd Cir. 1968); *Mil Ka Ko Research & Development Corp. v. Office of Economic Oppor-*

tunity, 352 F. Supp. 169 (D.C.D.C. 1972), *aff'd*, 497 F.2d 684 (D.C. Cir. 1974).

Logistical and ministerial considerations should eclipse the admissibility of Professor Paul Gaurnier's testimony. As a matter of fact, more time and argument have been wasted on and off the record regarding this issue than the time necessary for the testimony itself.

The Portman recognizes its burden herein. It has to show the petitioned-for unit is clearly inappropriate. *See Arcadian Shores, Inc., d/b/a Myrtle Beach Hilton*, 229 N.L.R.B 806 (1977), *en'd*, 580 F.2d 118 (4th Cir. 1978). Accordingly, to prohibit The Portman from introducing similar comparative evidence contrary to the union's "area pattern" evidence, would be arbitrary and capricious. *A fortiori*, this comparative evidence has already been adduced, much of it based upon the union's questioning.

This 18th day of November, 1987.

Respectfully Submitted,

/S/ ARCH STOKES

/S/ MARGARET A. MEAD

COUNSEL FOR THE PORTMAN

STOKES, LAZARUS & CARMICHAEL
80 Peachtree Park Dr., N.E.
Atlanta, Georgia 30309
(404) 352-1465

AFFIDAVIT

This affidavit is given as an "Offer of Proof" in the Unit Determination Case involving The Portman Hotel and Local 39 of the International Union of Operating Engineers before Region 20 of the National Labor Relations Board in San Francisco, California.

I, Professor Emeritus Paul L. Gaurnier, of the School of Hotel Administration, Cornell University, Ithaca, New York, do hereby swear that the following facts and statements are true and accurate to the best of my knowledge and belief:

1. I have taught hotel operations at the School of Hotel Administration at Cornell University to both seniors and graduate students for 19 years as a Professor of Management and Associate Dean and Acting Dean of the School. I have a Bachelor of Science Degree (1950) from Cornell University's School of Hotel Administration and a Master of Science (1956) from the same school. My personal resume is as follows:

PERSONAL VITA

PAUL L. GAURNIER

Present Position

Professor of Management, School of Hotel Administration, Cornell University. Responsible for Hotel Operations and Business Policy and Strategy courses.

Educational Background

Cornell University, School of Hotel Administration, Master of Science, 1956; Bachelor of Science, 1950.

Areas of Experience

Has held responsible positions in a wide variety of administrative, managerial, and operating positions at all levels of the Army, and also served three years with the Headquarters of the Defense Supply Agency, Department of Defense.

Has served as:

Assistant Dean, then Associate Dean of the School of Hotel Administration, Cornell University from September 1967 through June 1978

Director, Cornell Hotel and Restaurant Center for Professional Development, 1968 through 1979

Academic consultant for the Hilton International Career Development Institute

Expert hotel operations witness for eight law firms over the past five years

Consultant to six different investment/syndication groups over the past five years with responsibility to estimate "value" of acquisitions being considered and to select contract management company.

Other Consulting Responsibilities

Consultant to General Telephone and Electronics (GTE). First as senior consultant on the planning and construction of their Advanced Management Education Center in Norwalk, Connecticut. Second as person directly responsible for preparing Invitation for Bids, evaluating the IFB's, and then recommending

selection of contract management company. Currently on retainer as advisor on the overall hotel operations, including standards of service, performance appraisal, and productivity analysis. (1980 - Present.)

Advisor to Motor Hotel Management, Incorporated, the largest independent hotel contract management company in the U.S. with regard to all phases of hotel operations including feasibility studies, site selections, development and training of personnel, projected markets and organizational structure to meet those markets. Works closely with the President and Senior Vice Presidents of the company on an annual retainer basis (1978 to Present.)

Advisor of the First Expandominium and Syndications, Inc. group, headquartered in Clearwater, Florida. Worked closely with the Chairman of the Board and Vice President on an annual retainer basis. Major project involved the development of the Ravines Executive Meeting Place and Country Club, a luxury Florida resort. (1982 - 1983)

Project director of a major study for the World Bank, in Washington, D.C., to evaluate their entire food service/contractual arrangements. Responsibility included a complete questionnaire and survey of the 5,000 person World Bank staff; a thorough analysis of the contractual obligations with both the World Bank and the contractor; a thorough review of the food production, food service, and purchasing procedures being followed by the contractor; and analysis and recommendations as to organizational reporting structure within the World Bank which would better serve the Bank to oversee a multi-thousand meal a day operation. As an individual, worked with Bank officials on a follow-up study a year later. (1980 - 1981)

Advisor to Fulop, Rolston, Burns & McKittrick, a Law Corporation, Beverly Hills, California, with regard to a defense preparation of a \$140,000,000 claim by plaintiff (Dunes Hotel, Las Vegas) against Fulop, Rolston's client. My responsibilities involved complete analysis of the effectiveness of Dunes Hotel management strategy, the market segmentation approaches taken by management, the efficiency of the Dunes Hotel operations (to include rate setting, expenses, cost controls, productivity analysis, staffing scheduling, and market niche positioning), and financial projections concerning future revenues. (1977 - 1980)

Consultant to the Jefferson Company, Minneapolis, Minnesota, concerning a complete rehabilitation project on the St. Paul Hotel in St. Paul. Worked directly with the Chairman of the Board and the President in analyzing feasibility studies, methods of potential financing, standards for hotel operations, and types of market needs existing in St. Paul and how these needs could be best served and by which type of hotel and hotel company. (1979 - 1980)

Project director of a complete study for the Puerto Rico Industrial Development Company concerning the convention center complex in San Juan, to include the two hotels connected to the convention center. This project resulted in a complete analysis for Pridco, to include market potential, rates, income, expenses, energy costs, hotel operations, union relations, contract management recommendations and estimates of net present values of each individual property involved with the convention center. Personally assumed responsibility on a separate consulting agreement with Pridco officials to negotiate a contract with a hotel operating company to operate this center,

and to negotiate with potential investment groups concerning a possible sale of the complex. (1979 - 1980)

Advisor to Motor Hotel Management, Incorporated on a special sixmonth full-time project to design, develop, and implement a manpower development program which would meet the needs of their very diversified 45-property management company. (1978)

Project director of the joint venture School Program established by the Cornell University School of Administration/Tourism Development Company of the Commonwealth of Puerto Rico. (1970 - 1978)

Personal advisor to the Director of Tourism, Brazil, to evaluate proposals submitted by international hotel companies to build major hotels at various sites. Responsibilities included on-site inspections, recommendations as to type and size of proposed hotels, and the setting of standards required for the hotels to receive a luxury or first class designation by the Brazilian government. (1974 - 1975)

Co-author of "How to Invest in People," an industry-wide manual published under the auspices of the National Restaurant Association and funded by the Department of Labor. (1973)

Senior consultant to the Department of Labor/National Restaurant Association to develop workable career ladders for non-management personnel in the food service industry. (1971 - 1973)

Project director of the Department of Labor-funded study of "Career ladders and Manpower Development for Non-Management Personnel in the Food Service Industry," to identify skill areas, physical requirements, levels of education,

and training requirements for non-management food facility positions in the food service industry; to identify and evaluate current career system patterns and to construct a model career system or systems. (1969 - 1970)

Co-author of the Department of Defense Report of the Procurement Program - Radios, which has been the definitive program used throughout the Department of Defense with regard to the purchasing of radios and like items.

Additional Activities

Has lectured at numerous seminars in the United States, and in Japan, Korea, Hong Kong, Singapore, Okinawa, Mexico, Colombia, Peru, Brazil, France, Germany, Italy, Switzerland, and Sweden on different occasions.

Has evaluated hotels for the Inter-American Development Bank with regard to site selection for their annual world-wide financial ministers meeting.

Was member of the Steering Committee, Hotel Industry, National Alliance of Businessmen for two years.

Has served as:

Chief of:

Hotel evaluation which annually surveyed Jamaica hotels for the Jamaica Tourist Board (1969 - 1970)

Hotel evaluation group which completed a survey of 250 Caribbean Hotels for Air Canada (1971)

Hotel evaluation group which completed a survey of Florida hotels for Air Canada (1972)

Consultant to:

Economic Development Corporation, New York, NY

General Services Administration, Washington, DC

Inter-American Development Bank, Washington, DC

National Passenger Railroad Corporation (AMTRAK),
Washington, DC

Eight university study teams investigating the need for
Hotel programs

Chief of the Procurement Systems Branch in the Defense Supply Agency, DOD, which branch was charged with providing procurement analysis and supervision over the four-billion-dollar annual procurement of seven supply centers (1963 - 1966)

Principal supply advisor to Chief Quartermaster of the Republic of Vietnam Armed Forces, with direct responsibility for approval and administration of over 100,000,000 dollars of military aid supplies furnished to the Republic of Vietnam Armed Forces; and as such,

- assisted in the development of a Vietnamese Industrial Base to meet the needs of the Vietnamese Department of Defense and that of the local economy.
- made two special fact-finding trips to Korea to determine the capability of Korean industry to produce needed items to be used by the Vietnamese Armed Forces.
- directed the activities of a fact-finding team which set up in Taiwan the industrial capability to

**produce certain hard-to-get items needed for the
Vietnamese Armed Forces. (1966 - 1967)**

As a paid consultant and executive seminar teacher, I have personally and physically inspected hundreds of hotels in the United States, Mexico, Canada, Jamaica, Antigua, Martinique, Guadeloupe, Barbados, The Virgin Islands, El Salvador, Brazil, Venezuela, Puerto Rico, Germany, France, Italy, Great Britain, Hawaii, Japan, Taiwan, Korea, Hong Kong, Singapore, Indonesia, Thailand, Vietnam, India, Okinawa, Colombia, Peru, Switzerland and Sweden. In each visit, I was officially touring the hotel as a consultant representing either the group that operated the hotel, or as the person who was presenting the principle of management/hotel operation seminars to the executives who were operating these properties and in order to make the seminar more topical, the executives wanted me to know exactly how they operated in order that I could use it in the seminar.

In addition to having inspected hundreds of hotels, I have personally prepared and produced a written, analytical report concerning the entire operations of the property for at least 70 to 80 hotels in the Caribbean, South America, Mexico, Canada and the United States. For each of these written analytical reports I was a paid consultant to the owners, or to the hotel association, or to the government with responsibility for the operations of the hotels, especially the tourism departments of international governments. Hotel groups in the United States with which I have been directly involved in preparing operational analyses concerning many of their hotels, include the Marriott Group, the Hilton, Hyatt, Four Seasons, Sheraton, Stauffer, Ritz Carlton, Holiday Inns, Raphael Group (Alameda Plaza) and the Coleman Group (Tremont, Whitehall and the Navarro), and Japan

Airlines when it was originally starting the Nikko Group. In the City of San Francisco itself, I have taken official tours with executives of the hotel showing me complete operations data and providing me with financial data of The Fairmont, Stanford Court, The Hilton, The Clift, The Donatello, The St. Francis, The Hyatt Regency, The Portman, The Holiday Inn, and The Handlerly Motor Inn.

As a Professor of Management from the School of Hotel Administration at Cornell University, I have had the opportunity to lecture on the principles of management and hotel operations in the United States, Japan, Korea, Hong Kong, Singapore, India, Okinawa, Mexico, Colombia, Peru, Brazil, France, Germany, Italy, Switzerland, Sweden, Canada, Puerto Rico, Barbados, the Bahamas and Jamaica. At Cornell University, at the School of Hotel Administration Center for Professional Development, I was the Director of said Center for over 10 years, and personally lectured in the areas of principles of management and hotel operations. This past July (1987), the School of Hotel Administration presented a high level seminar limited to 26 qualified participants of General Managers and Resident Managers only, and I taught the first two days concerning the principles of organizational and functional assignments for hotel organizations as it pertained to hotel operations. There were 10 other renowned faculty and industry executives who taught and none taught more than one day; my contribution was two days of the 10-day program.

In 1985, I was one of two Professors who were brought over to Japan to lecture for a full week to various Japanese Chief Financial Officers and Chief Operating Officers for companies which were interested in expanding into the United States. This was an absolute give and take session in which the Japanese

Executives were expected to produce the basis for strategic decisions for the next few years regarding their expansion plans into this nation.

The Steigenberger Group, the most noted hotel chain in Germany also hired me to analyze their strategic plans for moving into the United States and in the summer of 1984 I met with their top executives to discuss the strategy they had already laid out and I was able to convince them to change this strategy completely, which they did. In the 20 years that I have taught at the school of hotel administration at Cornell in both the Principles of Management and the Hotel Operations course, I have taught literally hundreds of under-graduates and graduates, many of whom are well-placed executives in the hotel industry today. For the past eight years that I was at the school, I taught (along with another Professor), a course that was designated as a capstone course because it utilized all the teaching from previous courses for the four years. This course was restricted to seniors and graduate students and was called a Hotel Simulation Exercise and was limited to 20 students. My responsibility in this course was to completely analyze the analyses turned in by the seniors and the graduate students concerning specified hotel properties, hotel chains and restaurant properties and chains, and my obligation was to turn back to the students a thorough analysis of the analytical reports they have prepared. In the hotel operations course, the students (both seniors and graduate students), were required to write complete analyses of all the hotels visited (such as the New York Hilton, the Washington Hyatt, the Boston Sheraton), and I was obligated to make a complete oral presentation concerning each and every one of these reports and to analyze the strengths and weaknesses of the reports the students had turned in. In doing this, I needed to make a thorough analysis of the property

myself in order to be able to compare it against the students' projects. The Headquarters of Prudential Insurance Company has used me on several occasions as a mediator between the hotel management group operating the hotel and themselves. In each case, my report was completely accepted by both sides and all of the recommendations made were followed exactly. I have served as a mediator for M.H.M., Inc., the largest hotel operating management group in the United States on at least 10 occasions where they were at loggerheads with the owning group and both sides agreed to accept my written recommendations.

I have taught hotel operations at the School of Hotel Administration for both seniors and graduate students for 19 years as a Professor of Management and Associate Dean and Acting Dean of the School of Hotel Administration at Cornell University. During this time frame the hotel operations class has gone to the major hotel chains such as the Hilton, Hyatt, Sheraton, Holiday Inns; in addition to specific hotels, independent hotels such as the Saunders Group in Boston and the John Coleman Group in New York City previously called the Navarro, now the Ritz Carlton. In each case, the students were assigned specific projects that included analyzing the Department responsibilities for each of these various hotels and, especially the students were required to analyze the working relationships between Departments, between employees and supervisors, and between supervisors and top management within the hotels. The final report required of the students also had to include an analysis of the esprit de corps and the team effort that could be ascertained from visiting the property and how it related to guest satisfaction.

Therefore, over the years, I have had the opportunity to read many well-written reports from bright young people who

had no ax to grind at all in their evaluation of the organizational structure and the accomplishments of a particular hotel, especially as it related to the guest's treatment and the satisfaction of the guest's stay. In addition to this exposure to hotel operations, the enclosed resume indicates that I have done a considerable amount of work as a consultant in the industry. As a matter of fact, for the past five years I have taken a leave of absence for every Spring term at Cornell University because my consulting work was too heavy for me to teach both terms and to keep up with my work. Some of the background that is germane to this specific situation is my work with General Telephone and Electronics (GTE), first as a Senior Consultant on the entire planning and construction of their advanced management education center in Norwalk, Connecticut, and second as the person directly responsible for preparing the invitation for bids and evaluating those bids and then recommending the selection of the contract management company, and then probably the most important, a retainer as an advisor to GTE on the overall hotel operations including the standards of service and the performance and the productivity analysis that was so important to the atmosphere needed by GTE for their advanced management education center, in that the center, the rooms, the food, the beverage and all of the facilities were being operated by a third party; in this case Marriott received the contract. It was very important that the standards that GTE needed, especially for the ambience and the feeling of being part of the team that the attendees could feel, was almost as important as the material being covered in the seminar rooms. During the first two years of operation, it was necessary to request Marriott to relieve two executives from the center operations because of the attitudinal problems represented by both of these executives. This became necessary because I, as the Advisor to GTE, discovered that although the professionalism of

these particular executives was beyond reproach and their technical capability was certainly beyond reproach and they had done very well with Marriott (and that was why they had been chosen for the positions), their attitude was not what was needed in order to fit in with the Program Directors that GTE used in order to have the seminars be acceptable to the high level executives who were participants in the various programs at the education center. It became necessary, as a matter of fact, to promote two people who had been within the Marriott organization at a much lower level, whose attitudes did fit the needs of the GTE Program Directors and to promote these people into positions for which they were literally technically not qualified, but we were able to overcome this through training exercises and through on-the-job training with others, including myself. This experience highlighted to me the importance of attitude as compared to the skill or technical or knowledge normally required in a position, and the program directors for GTE who were putting on the Executive Development Seminars were literally the guests, if you will, of the Marriott management team operating the GTE Education Center.

From 1978 to 1987, I was the advisor to M.H.M., Inc., which is the largest contract management company within the hotel industry in the United States.

Initially, in 1978 I took a leave of absence from Cornell University in order to establish a manpower development program for the company which would allow them to identify, select, train and promote from within the organization. As a result of this initial work with the company during the later years I was with the company as an outside consultant, on an annual retainer, I was able to work with many of the young

executives interspersed throughout the company's hotel properties on a close, personal basis to assist them in accomplishing their goals, which included operating the hotel on a management contract representing M.H.M. in a profitable manner for the owners. Time and time again, I have seen M.H.M. take over a property which had been operated by another management company, or by the owners themselves, and because of the way in which M.H.M. treated its employees and the manner in which M.H.M. executives briefed the employees as to their benefits and as to what was expected of them, and as to what M.H.M. would do for them, I have seen the occupancy and revenues increase dramatically in hotels that had been operated previously by someone else who had not had the ability to generate the enthusiasm and the proper attitude within and among the employees and the departments within the hotel that would be so noticeable to the guests that they would want to come back to that same hotel on their next time in that town. As the only operations consultant to M.H.M. I was directly involved with many of the motivational training programs which M.H.M. did find was an absolute prerequisite to dealing with the employees before expecting them to accomplish any of their technical duties in operating the hotel.

Therefore, I have seen many instances where the exact same hotel, the same location, the same flag (in other words was it a Hilton or was it a Holiday Inn), the same employees, and with no extensive renovation or money being placed into the property, change from an unprofitable operation to a profitable operation within a period of six to eight months. In my opinion, this was directly attributable to the attitude among the employees and the cooperation among the employees in servicing the guests, and the consensus among the guests (we did many surveys in this regard), that they did come back to this

particular hotel because they liked the attitude and the way they were treated as a guest.

During the period 1970 through 1980, I was the advisor to the Puerto Rico Industrial Development Company which owns 11 hotels in Puerto Rico and to the Tourism Department in Puerto Rico with regard to aspects of tourism and hotel operations on the Island. I have done complete analysis to include the market potential, the rates, the income, the expenses, the energy costs, the hotel operations (in an overall sense), union relations and estimates of net present values of various properties owned by the Puerto Rico Industrial Development Company and in all cases the attitude of the employees was probably the most important factor in our analysis and our findings and recommendations. We had thousands of questionnaires from tourists, visitors, conventioners, and transient businessmen from which to obtain information and, without exception, the negatives involved the attitude of the Puerto Rican employee toward the guest — as perceived by the guest.

The impact of this information was so strong that the School of Hotel Administration at Cornell University agreed formally with the government of Puerto Rico to establish a joint venture school program in San Juan in order to begin to make inroads into the attitudes of the Puerto Rican youth who might be choosing the hotel industry as a career. From a technical and knowledge standpoint, the typical employee in the Puerto Rican resort hotels was extremely competent, yet the guest comments were very negative in a majority of the questionnaires because of the experience that the guest had had with a room clerk or with a food server or with a bellman, or with one of the engineers servicing a room, or with a doorman calling a cab. What came

across to the guest was an unpleasant experience rather than a lovely visit to a lovely Island — and all because of the tremendous attitudinal problems that existed on the Island at that time. The school at Puerto Rico, therefore, for years and years, and still does, emphasize motivation and human relations as much and more than emphasizing the technical aspects of the hotel operations business. All of us involved in this joint venture recognized it would be a long period of time before there would be any improvement in the attitude, if we could accomplish it at all. There has been some improvement during the early 1980's which we attribute to the school, but as yet the level of pleasantness and services to the guest certainly has not reached the point that the Puerto Rico Industrial Development Company officials would like.

**"FACTS ESTABLISHING EXPERIENCE AT PORTMAN HOTEL
- SAN FRANCISCO"**

I arrived at The Portman Hotel in San Francisco on Thursday, November 12, 1987, as a guest, and checked in the normal and usual manner. This is my fifth day as a guest in the hotel and my wife and I have eaten meals in the hotel to include breakfast, lunch and dinner, and we have used room service on four different occasions. I was present when the personal valet made up the room on two occasions and had the opportunity to talk with both of those gentleman (one day was on a weekend and there was a different personal valet than during the weekday). Additionally, I had the opportunity to talk as a guest with employees from the guest services area which included both the front door porter and doorman and the reception personnel; I had a long talk with an engineer who was lighting the fireplace on Saturday evening when I was sitting there, I have had a chance to talk with food service personnel and with

the room service personnel and, by coincidence, had quite a chat with one of the administrative assistants who was standing by to service a large influx of guests (175 check-ins on a Friday afternoon) as an assist to the usual guest services contingent. Additionally, I was officially given a tour of the entire property and met many of the management, supervisors, employees, and was able to talk with them during the tour with no one attempting to lead or to direct my questions or the employee's answers. Therefore with my experience and in analyzing properties, tied in with my 5-day stay as a guest, and my official tour of the complete building and the opportunity to talk to employees from all departments, I have been able to form some very definite opinions about the organizational structure and the reporting relationships which are currently in place in The Portman Hotel.

"FACTS ESTABLISHING EXPERIENCE AT COMPARISON PROPERTIES:"

In order to compare properly The Portman organization with those of some other luxury hotels in San Francisco, I made arrangements to visit with the Executive Assistant Manager (whom I had known well previously), and the Controller of the Four Seasons Clift Hotel, and talked with an assistant manager at The Stanford Court (a hotel that I had been very familiar with previously and, in fact, had been privy to all of their initial pre-opening training information and operating procedures). The tour through the Clift Hotel allowed me to talk with employees, and then on the second day of my visit to The Clift I was able to talk with two of the executives for several hours concerning organizational structure and work units and the like, in that both of the Executives had been students in my hotel operations class at Cornell University. This was a total discussion concerning

classical management versus job descriptions versus productivity versus synergism within an organization, and what organizational structure works best in attempting to operate a luxury hotel. My conversation with the assistant manager at the Stanford Court then confirmed what I had already known previously about the Stanford Court in its organizational structure, and the manner in which it is operated. Consequently, I have been able to make a comparison concerning the organizational structure and the operating procedures which are currently in place at The Portman Hotel as compared to the other luxury hotels in San Francisco.

"FINDINGS REGARDING THE PORTMAN HOTEL:"

The operating procedures written prior to the opening of The Portman Hotel envisioned the property with employees working together as an intrinsic unit without any of the problems associated with "turf responsibility" being a factor in the operation of the property. In my opinion, this has already been accomplished and is in place at The Portman Hotel. There are many ____ examples that indicate the synergism and the esprit de corp that is present at The Portman Hotel and I shall cite several: during my tour, Mark Everton, the controller, was able to introduce me to almost every employee we met by name and to give a brief description of what he or she did and in each case the employee related well back to Everton in a team work type of attitude which is just not present in the normal work unit in today's world. Everton, as a matter of fact, was able to discuss a problem the hotel is having with leaking showers with one of the engineers with whom we talked on my tour and the engineer obviously enjoyed talking on an equal one-to-one basis with the Controller of the Hotel and you could see and feel the camaraderie which was evident between these two gentlemen.

Another example was the way that the fire room (called the Fireman's Control Room) is administered and manned. Both the Security and the Property Management people must take care of this room and must assign someone to watch over it, but in case of emergency the Security representative immediately takes over until the Property Management Engineer who is in charge of the guest safety can get there until the fire department arrives. This is an exceedingly important example because it is not management here who is responsible for the guest safety in case of emergency, but it is the Property Management Engineer assigned person who takes over the room and is in charge, and it is the Security representative whose office is right next to the Fireman's Control Room who takes over first and the coordination required between these two departments (i.e., Security and Property Management), is very important to the working of this arrangement and to the safety of the guest. Another example of the truly integrated atmosphere that I encountered at The Portman was the manner in which 175 incoming guests were handled Friday afternoon and early evening. People from all Departments came down, left their own jobs, in order to assist the doorman, the porter and the guest services reception people to process this large influx (large for this size hotel) of incoming guests. Having the opportunity to talk with several of them while standing waiting for the guests, I was smitten with the complete feeling of teamwork and integrated atmosphere that permeated the entire situation. Another strong example of the synergism present in The Portman Hotel is the integration of the personal valet guest service personnel into the team as compared to the normal hotel organization where the housekeeping department is almost always female, and as such (for whatever reason) come in and make up the rooms and do not participate in other aspects of guest services. Whereas in The Portman the personal valet is the

contact for the guest to the rest of the hotel and particularly if something needs to be done within the room, the personal valet is able to accomplish it without having to fill out a work order to maintenance, to the engineering department, and wait to have it done. The engineers, in fact, are assigned to help the personal valets either by assisting them in doing something or by loaning them tools to accomplish first echelon maintenance such as fixing a drape or a valance which is in need of fixing, or to cover up a chip on the wall, etc.; and already I have seen evidence where the engineering department is integrated in the respect that not only do they encourage this to be done within the hotel, but they cooperate with other people who are on site in the guest rooms accomplishing things for the pleasure and the service of the guest; that the engineers themselves would be too busy to do.

In the final analysis, nothing is more important than the satisfaction of the guest. The conversation I had with the engineer who was lighting the fireplaces in the lobby was very enlightening and he was an exceedingly articulate, self-assured gentleman who was talking to me as a guest, and was talking to me certainly as an equal, and a very comfortable equal, and telling me about the hotel and about how "Mr. Portman really wanted to have the guests have a decent experience sitting in the lobby, hence the fireplaces." Had I been a guest who would be coming back to San Francisco time and again, this experience alone (i.e., having the opportunity to talk with an engineer who was articulate and who was concerned with my well-being as a guest and in keeping me informed as to the background of why something had been built) would certainly heighten my desire to come back to The Portman.

Another example which is so different from what I am used to in the typical hotel organization included the interaction between an assistant auditor and the engineer who volunteered to help the assistant auditor learn how to use a tool and to be able to put in a secure fence down in the basement behind which could be stored key items. The engineering people were too busy to accomplish the job so one of the assistant auditors volunteered to do it and one of the engineers loaned him the tools with which to drill the holes in the concrete floor and showed him how to use the tool and offered to assist whenever he needed it if he got into trouble. Therefore, the assistant auditor was able to go ahead and put up a complete structure that would be secure for storing key items and the engineer department was able to go on with their tasks, but under normal organizational responsibilities, this job would have had to have been accomplished by an engineering department person, while some of the other important engineering tasks were held in abeyance while he accomplished this immediate project.

At the present time there is no question that The Portman Hotel employees, even though they are organized in the departments, all have a common goal—which is the guest as the product of this organization. They are organized to produce this product, which is guest satisfaction and the loyalty of the guest which would cause the guest to return. There is no segregation or separation of departments with specific work duties or specific responsibilities or specific loyalties elsewhere which would interfere with this loyalty to The Portman Hotel as an organization that wants to make the guest experience a pleasant one which would cause him or her to return. From an academic point of view, the organization currently in place at The Portman Hotel can best be described as a modified matrix organization where persons have a supervisor in a normal sense of the word

and belong to a department in the normal organizational manner, but also report to others in a technical sense as needed (i.e., project directorships and getting specific acts accomplished fast). Matrix organizations came into being because of the need to accomplish the mission and change the organization quickly without regard to false organizational barriers between departments. It has especially been useful in large weapons systems procurement with the United States Government and large defense contractors, and without the matrix organization that deadlines imposed and that have normally been met would have been unrealistic deadlines because of the necessary organizational bureaucracy which is present in most organizations. The modified matrix organization at The Portman Hotel at this time is working, the employees have tremendous esprit de corp, the guest satisfaction is excellent, and without this type of satisfaction and this type of ambience that would please the guest there will be nothing to separate The Portman Hotel from the already established properties here in San Francisco, and it would be doubtful that The Portman would be able to break into that small market share well enough in order to survive.

FINDINGS WITH REGARD TO THE COMPARISON HOTELS, ESPECIALLY THE CLIFT AND THE STANFORD COURT:

The Clift and The Stanford Court are both very well managed and have exceedingly good reputations and yet are unable to have the freedom to react to some of the guest service needs as quickly as The Portman can at the present time because of the segregation of the departments and the specific job descriptions and barriers between the departments as to who and which department accomplishes which task. In fact, the work order board at The Clift Hotel was very typical of most

hotels wherein it was jam packed with small jobs that needed to be done to the various hotel rooms in The Clift, most of which could have been accomplished by someone not at the skill level and technical knowledge level of the engineers, yet because of the work rules it had to be accomplished by only a member of the engineer department and the work kept piling up and the engineer department, in spite of being a hard working conscientious crew, just had to get to those work orders as they could. Consequently, there are guest rooms that are in need of small first echelon maintenance that can not be done immediately as it can be at The Portman Hotel at this time.

The organization assignment currently at The Clift and The Stanford Court is similar to what I have been used to in many many consulting situations and in many visits with my hotel operations classes to well-operated hotels, but still without the barriers imposed by specific segregated job related requirements, the hotels would be able to service the guest (i.e, which is really the organizational structure need is the guest service, in a much better manner).

OPINION CONCERNING THE BARGAINING UNIT

In my opinion, The Portman Hotel has planned for and has accomplished an organization structure which includes all of the employees integrated in a synergistic group which will accomplish the servicing of the guest in a manner which will make a guest want to come back. I believe that an examination of the esprit de corp of the employees would indicate that The Portman has been successful in this organizational structure, and that the employees are treated well (in fact they are even called "associates"), and that the employees feel not only that they belong to the hotel and they are proud of the hotel (reference, for example, the engineering member telling me as a guest about how wonderful the fireplaces were and what a good thought it

was by Mr. Portman), but the employees take pride in being a part of the team. My experience over many years leads me to the conclusion that any barriers brought about because of a segmentation of one department being unionized and the rest of them not would be to the detriment of the entire work force to include the engineering department. The success or failure of The Portman Hotel is important to each and every employee, whether he or she be unionized or not unionized, and the current organizational structure where the employees are free to cross boundaries and to perform other job tasks (i.e., a true matrix organization) is the best way to accomplish the mission of this property which is to produce a great guest satisfaction experience to bring the guest back again. There are many good hotels in this city, and if The Portman fails in its attempt to break into this luxury market, the employees will be injured whether they are unionized or not because as The Portman would be required to cut down on the number of employees and try to reduce its costs to keep in line with the revenues which would be less than anticipated in the original pro-forma, the service and the ambience would suffer, certainly the guest satisfaction would be lessened, but the end loser would really be the employees currently here in The Portman Hotel.

This is a relatively small luxury hotel which needs the entire ambience and the total integration of the employees as a team in order to succeed. I believe the current organization where there is no segregation and no work barrier imposed between and among departments is the only way this hotel can survive.

I swear under penalty of perjury that the foregoing facts are true and accurate to the best of my knowledge.

Dated this 17th day of November.

/s/Paul L. Guarnier

